REPORTS OF CASES

DECIDED BY THE

JUDGES OF THE SUPREME COURT

OF

PENNSYLVANIA,

IN THE COURT OF

NISI PRIUS AT PHILADELPHIA,

AND ALSO IN THE

Supreme Court.

WITH

NOTES AND REFERENCES TO RECENT DECISIONS.

BY

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PREFACE.

MANY of the following cases have appeared in the various law periodicals of the day, but they are so scattered through a number of volumes as to be almost inaccessible to a majority of the profession. The Reporter therefore concluded that a republication of those cases, with others decided by the same learned judges, would be acceptable to the bar; the more especially as many of them contain points of great interest, and all of them, from the distinguished ability and profound learning of the judges by whom they were determined, must be entitled, if not to the weight of conclusive authorities, yet, at least, to the respect and credit which has ever been accorded to the opinions of the judges of our court of last resort.

Several interesting Equity cases will be found among those here reported, in which important principles are discussed with great learning by the judges who delivered the opinions, and which will be guides hereafter in the equitable practice of the state. With the exception of the late able Reports of Mr. Justice Parsons, our books contain few cases on the principles and practice of equity; it is, therefore, hoped that the present volume may not be found without its use in the library of the Pennsylvania lawyer.

PHILADELPHIA, MAY, 1851.

TABLE OF CASES.

[THE CASES IN ITALICS ARE CITED IN THE NOTES.]

CASES

IN THE

COURT OF NISI PRIUS,

AT

PHILADELPHIA.

Olmsted's Case.

[APRIL 17, 1809.]

A state court has a right to discharge a prisoner committed under process from a federal court, if it clearly appears that the federal court had no jurisdiction of the case.

Questions of prize, since the adoption of the constitution of the United States, are exclusively within the jurisdiction of the federal courts.

It is not sufficient, to oust the jurisdiction of the federal courts, that the state claims an interest in the subject of the dispute.

The best rule by which to arrive at the meaning and intention of a law, is to abide by the *words* which the law-maker has used; and this rule holds most strongly in expounding a constitution.

It is not a justification of the offence of obstructing the execution of process issued out of a federal court, that the defendants were subordinate officers of the militia of a state, and acted under the sanction of a law of the state, and under orders from the governor and commander in chief of the militia of the state.

It seems, that the 11th article of the amendments to the constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit *in law or equity*, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," does not extend to suits of admiralty or maritime jurisdiction.

[Olmsted's Case.]

On the 25th of November, 1775, congress passed an act for the purpose of erecting tribunals of admiralty jurisdiction. The 4th section provides, "that it be and is hereby recommended to the several legislatures in the united colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, *and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient;*" and the 6th section provides that, "in *all cases* an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals."

By resolutions of congress, in 1777, a committee of appeals was appointed, consisting of members of congress, any three of whom were empowered to hear and finally determine upon appeals brought to congress.

On the 9th of September, 1778, the state of Pennsylvania passed an act for establishing a court of admiralty, the 6th and 7th sections of which provided, that the trial in such cases should be by jury; that "the finding of the jury shall establish the *facts*, without re-examination or appeal;" and "that in all cases of captures, an appeal from the decree of the judge of admiralty of this state, shall be allowed to the continental congress, or such person or persons as they may, from time to time, appoint for hearing and trying appeals."

The British sloop Active was captured on the high seas in September, 1778, by Gideon Olmsted and others, and brought into the port of Philadelphia, where she was libelled in the court of admiralty, held before George Ross, Esquire, then judge of that court. Olmsted and the others claimed the whole vessel and cargo exclusively; but Thomas Huston, commander of the brig Convention, *a vessel of war belonging to the state of Pennsylvania*, claimed a moiety *for the state*, himself and crew; and James Josiah,

master of the sloop Gerard, a private vessel of war, claimed for himself, owners and crew, a fourth part; leaving a fourth for Olmsted and his associates. The ground of the two latter claims was, that the Gerard and Convention were in sight at the time of the capture, and before hostilities between Olmsted and the crew of the Active had ceased.

On the 4th of November, 1778, the libels were tried before a jury, and a general verdict was rendered, by which each of these claims were recognised and allowed. From the judgment of the court, on this verdict, Olmsted appealed to the "continental congress, or such court and authority as they shall constitute and appoint to hear and determine the said appeal." And on the 15th of December, 1778, the committee of appeals, (then consisting of the Hon. Oliver Ellsworth, late chief justice of the United States, the Hon. William Henry Drayton, formerly chief justice of South Carolina, William Ellery and John Henry, Jr., Esquires,) reversed the decree of Judge Ross, and decreed the whole of the proceeds to the appellants. Judge Ross refused to obey this decree of reversal, because the case had been tried before him by a jury; and paid a moiety of the net proceeds of the prize into the treasury of Pennsylvania, taking a bond of indemnity from David Rittenhouse, the treasurer, in pursuance of a resolution of the supreme executive council, dated April 21, 1779.

The committee of appeals thereupon ordered it to be entered on record, that the judge and marshal of the admiralty had absolutely refused obedience to their decree, that they were unwilling, at that critical juncture in the public affairs, to enter upon any proceedings for contempt, but that they would not hear any appeal until their authority should be so settled as to give full efficacy to their decrees and process. They laid a statement of the whole proceedings before congress, which was referred to a committee, who, in a brief report, demonstrated the powers of congress, and the jurisdiction of the committee of appeals;

and, by resolution, requested the state legislature to appoint a committee to confer upon the subject with the committee of congress. This was not acceded to, but on the 29th of November, 1779, the legislature passed an act directing George Ross, Esquire, to pay over the whole proceeds to David Rittenhouse, Captain Huston and Captain Josiah.

Olmsted thereupon brought suit in the court of common pleas, for the county of Lancaster, against the executors of Judge Ross, then deceased, where he obtained judgment by default; whereupon the executors delivered to him the bond of indemnity which Judge Ross had taken from David Rittenhouse, the state treasurer. Upon this bond, Olmsted instituted a suit in the supreme court of Pennsylvania, in the name of the executors of Ross, for his use, against Mr. Rittenhouse, in which it was decided, at April sessions, 1792, that neither the court of common pleas nor the supreme court had jurisdiction of the cause, and judgment was accordingly entered for the defendant. 2 *Dall.* 160.

In 1802, Olmsted and his associates, in consequence of the decision of the supreme court of the United States, in *Penhallow* v. *Doane's Administrators*, 3 *Dall.* 54, that the district courts of the United States had authority to carry into execution the decrees of the committee of appeals, appointed by congress under the old confederation, filed their libel in the district court of Pennsylvania, in which they prayed that Mrs. Sergeant and Mrs. Waters, the daughters and executrices of Mr. Rittenhouse, might be cited to appear and produce an account of the moneys received by their father from the sale of the Active, and to abide the order of the court. The decree of Judge Peters, on the 14th of January, 1803, was in favour of the libellants; but no application was made to that court for peremptory process against the respondents for several years. In the interval, Mr. Olmsted, who had centred in himself the claims of all the libellants, ineffectually applied to the legislature of Pennsylvania for relief.

[Olmsted's Case.]

On the 2d of April, 1803, an act was passed authorizing the governor to direct the attorney-general to demand the money from the executrices, or to bring suit against them in case of refusal. The governor was also authorized "to protect the just rights of the state, in respect of the premises, by any further means or measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever issued out of any federal court, in consequence of their obedience to the requisition," made by the attorney-general, and also "in the name of this commonwealth," to give them "a sufficient instrument of indemnification."

On the 29th of May, 1807, Mrs. Sergeant and Mrs. Waters filed a suggestion in the district court, reciting this act at length. They further stated, that being required by the proper authority to pay into the treasury the money admitted to have been received as executrices of David Rittenhouse, in manner aforesaid, they had paid the same into the treasury. That the money came into the hands of Mr. Rittenhouse as the treasurer, as appears by his bond, and that the decree of the court was pronounced, so far as respected the rights and jurisdiction of the state, *ex parte*, and without jurisdiction.

Compulsory process against the executrices was then demanded on behalf of Olmsted, but Judge PETERS being fearful of embroiling the government of the United States and that of Pennsylvania, and being desirous of having his own opinion corroborated by that of the supreme court of the United States, refused to grant it; and alleged these reasons, *inter alia*, in his return to a *mandamus* issued from that tribunal. At the February sessions, 1809, this return was argued, and a peremptory *mandamus* awarded. 5 *Cranch*, 115.

On the 27th of February, 1809, the governor of Pennsylvania issued his orders to General Michael Bright, di-

recting him to call out a portion of the militia, in order to protect the persons and property of the executrices against any process which might be issued in consequence of the *mandamus*.

On the 24th of March, 1809, the marshal of the United States received an attachment against the persons of the executrices, and on the 25th was prevented from serving the process by the soldiers under the command of General Bright. On the 15th of April, the marshal eluded the vigilance of the militia, and succeeded in executing his process upon Mrs. Sergeant. On the 17th, a writ of *habeas corpus* was issued, upon the petition of Mrs. Sergeant, directed to John Smith, the marshal, and returnable before the Chief Justice of Pennsylvania. To this writ the marshal returned, that he held Mrs. Sergeant in custody by virtue of the attachment issued from the district court of the United States.

After argument, the following opinion was delivered by

Tilghman, C. J.—If I order Mrs. Sergeant to be discharged, it must be because the court of the United States has proceeded in a case in which it had no jurisdiction. If it had jurisdiction, I have no right to inquire into its judgment or interfere with its process. But the counsel of Olmsted have brought forward a preliminary question, whether I have a right to discharge the prisoner even if I should be clearly of opinion that the district court had no jurisdiction. I am aware of the magnitude of this question, and have given it the consideration it deserves. My opinion is, with great deference to those who may entertain different sentiments, that in the case supposed I should have a right and it would be my duty to discharge the prisoner. This right flows from the nature of our federal constitution, which leaves to the several states absolute supremacy in all cases in which it is not yielded to the United States. This sufficiently appears from the general scope and spirit of the instrument.

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The United States have no power, legislative or judicial, except what is derived from the constitution. When these powers are clearly exceeded, the independence of the states, and the peace of the union demand that the state courts should, in cases brought properly before them, give redress. There is no law which forbids it; their oath of office exacts it, and, if they do not, what course is to be taken? We must be reduced to the miserable extremity of opposing force to force, and arraying citizen against citizen; for it is in vain to expect that the states will submit to manifest and flagrant usurpations of power by the United States, if (which God forbid) they should ever attempt them. If congress should pass a bill of attainder, or lay a tax or duty on articles exported from any state, (from both which powers they are expressly excluded,) such laws would be null and void, and all persons who acted under them would be subject to actions in the state courts. If a court of the United States should enter judgment against a state which refused to appear in an action brought against it by a citizen of another state, or of a foreign state, such judgment would be void, and all persons who act under it would be trespassers. These cases appear so plain that they will hardly be disputed: it is only in considering doubtful cases that our minds feel a difficulty in deciding; but, if in the plainest case which can be conceived, the state courts may declare a judgment to be void, the principle is established. But while I assert the power of state courts, I am deeply sensible of the necessity of exercising it with the greatest discretion. Wo to that judge who rashly or wantonly attempts to arrest the authority of the United States; let him reflect again and again before he declares that a law or a judgment has no validity. The counsel for Mrs. Sergeant have with great candour and propriety admitted, that when there is reasonable cause for doubt, that doubt should be decisive in favour of the judgment in question. The same principle has been adopted by the judges of the supreme court of the

United States, and of our own state, when questions concerning the validity of laws have come before them, and it has my hearty approbation.

Having disposed of the preliminary question, I will now consider the point of jurisdiction. If the district court had no jurisdiction, it must either be on account of the subject of the suit, or the persons who were parties. I will examine them separately. The subject is a matter of prize, which arose before the adoption of the present constitution. By the 2d section of the 3d article of the constitution, the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." These expressions comprehend all cases which had arisen or which should arise; and it was no doubt the intent to comprehend them; because otherwise, all antecedent cases would have been left unprovided for. I believe this construction has universally prevailed, nor has it been questioned in the course of the argument in this case. It appears then, that the subject of the libel is directly within the jurisdiction of the court, being a matter of admiralty jurisdiction. It is unnecessary for me to give any opinion concerning the right of the old court of appeals to reverse the decision of juries, contrary to the provisions of the act of assembly of Pennsylvania, under which the state court of admiralty was instituted. That is the point which occasioned so much jealousy and heartburning between several of the states and the old congress; it divided the opinions of many men of unquestionable talents and integrity, and certainly was a question of no small difficulty. But the state of Pennsylvania, having ratified the present constitution, did thereby virtually invest the courts of the United States with power to decide this controversy. They have decided it, and being clearly within their jurisdiction, I am not at liberty to consider it as now open to discussion. The supreme court of the United States has more than once decided, that the old court of appeals had the power to reverse the verdict of juries, notwith-

standing the law of any state to the contrary. From the establishment of this principle, it irresistibly results, that Gideon Olmsted and his associates were entitled to the whole proceeds of the Active and her cargo, and may pursue them into whatever hands they have fallen, unless indeed they have fallen into the hands of persons not subject to an action in the courts of the United States. This leads me to the question concerning the parties to the suit, the only question which has appeared to me to be of real difficulty, and which I was pleased to hear argued with great force and candour by the counsel for Mrs. Sergeant. It is declared by the 11th article of the amendments of the constitution, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." The record in this case shows a suit between citizens of Connecticut and citizens of Pennsylvania. It is therefore not within the words of the amendment. But it is contended, that although not within the words, it is within the spirit, because the suit is brought against persons representing an officer of the state, who received the property in question for the use of the state. There is weight in the observation, that the inconvenience would be very great, if the plaintiff in any action might by an evasion, by substituting the officer of the state in the place of the state, compel the state to abandon its property or contest it in the courts of the United States. In a case so circumstanced, the argument would be very powerful against the jurisdiction of the federal courts. But I cannot say, judging from the facts judicially disclosed to me, (which are all that I can judge from,) that the present case is so circumstanced. The certificates were certainly paid to Mr. Rittenhouse, as treasurer of the state. But it is equally certain, that neither he nor his representatives since his death, did deposit them in the treasury of Pennsylvania; on the

contrary, they were invested by him in a new fund in his own name, and it appears by his written memorandum, that he did not consider them as the property of the state, but his own property, until the state should give him a certain indemnification, which was never given. If this evidence is not strong enough to show that the certificates and money were not in the possession of the state, it acquires an additional strength, difficult to resist, from the circumstance stated in the answer of Elizabeth Sergeant and Esther Waters, "that they had refused to deliver them to the treasurer of the state, although expressly required so to do." Whether the conduct of Mr. Rittenhouse and his executrices was right or wrong is not the point now to be inquired into. The fact is that they did withhold the certificates and interest money from the treasury, until after the final decree of the district court. Their paying it afterwards cannot affect the question of jurisdiction. How then does the case stand? The property of these certificates and interest money was irrevocably vested in Olmsted, &c., by the decree of the former court of appeals, which the supreme court of the United States, since the adoption of the present constitution, has decided to be conclusive. The possession was not in the state, and the suit was not brought against the state or any of its officers. I do not see then how it can be maintained, even under a liberal construction of the 11th article of the amendments, that the state was a party to the suit in the district court. Several acts and resolutions of the legislature of Pennsylvania were read in the course of the argument, concerning which I am not called upon to decide. I exercise the right, in common with my fellow-citizens, of speaking my sentiments on political occurrences in private conversations, but it would ill become me on this occasion to express any opinion concerning the policy which the state has thought proper to pursue. Whatever they have done, I extend to them the same charity which I ask for myself, the belief that they have acted from

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pure motives. But although I say nothing concerning the policy of the government, I may be allowed, without impropriety, to express my anxious hope, that this long continued controversy will be brought to a termination without any material interruption of that harmony between this state and the United States so essential to the prosperity of both.

On the whole of this case, I cannot say that it clearly appears to me, that the district court of the United States made its decree in a cause of which it had no jurisdiction. I must order therefore that Mrs. Sergeant remain in the custody of the marshal.*

* At the April term, 1809, Gen. Bright and several others were indicted in the circuit court of the United States, under the twenty-second section of the act of congress of the 30th April, 1790, for obstructing the process of the court. On the trial of this case the following charge to the jury was delivered by

WASHINGTON, J.—Impressed with the magnitude of the questions which have been discussed, we could have wished for more time to deliberate upon them, and for an opportunity to commit to writing the opinion which we have formed, that it might have been rendered more intelligible to you, and less susceptible of being misunderstood by others. But we could not postpone the charge, without being guilty of the impropriety of suffering the jury to separate, after the arguments of counsel were closed, or of keeping them together until Monday; a hardship which we could not think of imposing upon them. I shall proceed therefore to state to you, in the best way I can, the opinion of the court upon this novel and interesting case. It may not be improper, in the first place, to refresh your minds with a short history of the transactions which have led to the offence with which these defendants are charged; and to consequences which might have been of serious import to the nation.

Gideon Olmsted and three others, having fallen into the hands of the enemy, during the latter part of the year 1778, were put on board the sloop Active at Jamaica, as prisoners of war, in order to be conducted to New York, whither this vessel was destined with supplies for the British troops. During the voyage, Olmsted and his companions, who had assisted in navigating the vessel, formed the bold design of taking her from the enemy; in which, with great hazard to themselves, they ultimately succeeded. Having confined in the cabin the officers, passengers, and most of the men, they steered for some port in the United States, and had got within five miles of Egg Harbour, when Captain Huston, commanding the brig Convention, belonging to the state of Pennsylvania, came up with them, and captured the Active as a prize. The sloop was conducted to Philadelphia, and libelled in the court of admiralty, established under an act of the legislature of that state.

[Olmsted's Case.]

Claims were filed by Olmsted and his associates for the whole of the vessel and cargo, and by James Josiah, commander of a private armed vessel, which was in sight at the time of the capture by Huston, for a proportion of the prize. Depositions were taken in the cause. A jury was impannelled to try it. The question of fact was, whether the enemy was completely subdued or not, by Olmsted and his companions, at the time when Capt. Huston came up with them.—The jury, without stating a single fact, found a general verdict, for one fourth to Olmsted and his associates, and the residue to Huston and Josiah, to be divided according to law and an agreement between them. From the sentence of the court upon this verdict, Olmsted appealed to the court of appeals in prize causes, established by congress, where, after a hearing of the parties, the sentence of the admiralty court was reversed, the whole prize decreed to the appellants, and process was directed to issue from the court of admiralty, commanding the marshal to sell the vessel and cargo, and to pay over the net proceeds to those claimants.

The judge of the court of admiralty refused to acknowledge the jurisdiction of the court of appeals over a verdict found in the inferior court; directed the marshal to make the sale, and to bring the proceeds into court. This was done, and the judge acknowledged the receipt of the money, on the marshal's return. In May, 1779, George Ross, the judge of the court of admiralty, delivered over to David Rittenhouse, treasurer of this state, £11,469 9*s.* 9*d.* in loan office certificates, issued in his own name, being the proportion of the prize money to which the state was entitled, by the sentence of the inferior court of admiralty. Rittenhouse at the same time executed a bond to Ross, obliging himself, his heirs, executors, &c., to restore the sum so paid, in case Ross should, by due course of law, be compelled to pay the same according to the decree of the court of appeals. In the condition of this bond, the obligor is described as being treasurer of the state; and the money is stated as having been paid to him for the use of the state.—Indents were issued to Rittenhouse, on the above certificates, and these were afterwards funded in the name of Rittenhouse, for the benefit of those who might eventually appear to be entitled to them.

After the death of Rittenhouse, these certificates, together with the interest thereon, which had been received, came to the hands of Mrs. Sergeant and Mrs. Waters, his representatives. The papers which covered the certificates were endorsed in the hand-writing of Mr. Rittenhouse, with a memorandum declaring that they will be the property of the state of Pennsylvania, when the state releases him from the bond he had given to George Ross, judge of the admiralty, for paying the fifty original certificates into the treasury as the state's share of the prize. No such release ever was given. The certificates thus remaining in the possession of the representatives of Rittenhouse, Olmsted filed his libel against them in the district court of Pennsylvania, praying execution of the decree of the court of appeals. Answers were filed by these ladies; but no claim was interposed, nor any suggestion made of interest on the part of the state, and in January, 1803, the court decreed in favour of the libellants.

On the 2d of April, in the same year, the legislature of Pennsylvania passed a law, authorizing the attorney-general to require Mrs. Sergeant and Mrs.

Waters to pay into the treasury the moneys acknowledged by them, in their answer in the district court, to have been received, without regard to the decree of that court; and in case they should refuse, that a suit should be instituted against them in the name of the commonwealth for the said moneys. The governor was also required to protect the just rights of the state, by any further measures he might deem necessary; and also to protect the persons and properties of those ladies from any process which might issue out of the federal court, in consequence of their obedience to this requisition, and further should give them a sufficient instrument of indemnification in case they should pay the money to the state. No further proceedings took place in the district court for some time after the passage of this law.

And when, at length, an application was made for process of execution, the judge of that court, with a very commendable degree of prudence, declined ordering it; with a view to bring before the supreme court of the United States a question so delicate in itself, and which was likely to produce the most serious consequences to the nation. Upon the application of Olmsted, the supreme court issued a mandamus to the judge of the district court, commanding him to execute the sentence pronounced by him in that case, or to show cause to the contrary. The reasons for withholding the process, assigned in answer to this writ, not being deemed sufficient by the supreme court, a peremptory mandamus was awarded.

It may not be improper here to state, that no person appeared in the supreme court on the part of the state, or on that of Mrs. Sergeant and Mrs. Waters, and that no arguments were offered on the part of Olmsted. The idea, which I understand has gone abroad, that the mandamus was awarded upon the single opinion of the chief justice, is too absurd to deserve a serious refutation. No instance of that sort ever did or could occur; and in this particular case, I do not recollect that there was one dissentient from the opinion pronounced.

Process of execution having been awarded by the judge of the district court, in obedience to the mandamus, the defendant, General Michael Bright, commanding a brigade of the militia of the commonwealth of Pennsylvania, received orders from the governor of the state,—"immediately to have in readiness such a portion of the militia under his command, as might be necessary to execute the orders, and to employ them to protect and defend the persons and the property of the said Elizabeth Sergeant and Esther Waters, from and against any process, founded on the decree of the said Richard Peters, judge of the district court of the United States aforesaid; and in virtue of which, any officer, under the direction of any court of the United States, may attempt to attach the persons or the property of the said Elizabeth Sergeant and Esther Waters." A guard was accordingly placed at the houses of Mrs. Sergeant and Mrs. Waters, and it has been fully proved, and is admitted, that the defendants, with a full knowledge of the character of the marshal of this district, of his business, and his commission, and the process which he had to execute having been read to them, opposed, with muskets and bayonets, the persevering efforts of that officer to serve the writ; and by such resistance, prevented him from serving it.

There is no dispute about the facts. The defendants have called no witnesses; and their defence is rested upon the lawfulness of the acts laid in the indictment. They justify their conduct upon two grounds—1st. That the

decree of the district court, under which the process was issued, was *coram non judice*, and to all intents and purposes void; and 2dly. That though it were a valid and binding decree, still that they cannot be questioned criminally for acting in obedience to the orders of the governor of the state.

The decree of the district court is said to be void, for two reasons; first, because the court of appeals had not power to reverse the sentence of the court of admiralty, founded upon the verdict of a jury; and, secondly, because the state of Pennsylvania claims an interest in the subject which was in controversy in the district court.

The first question is, was the decree of the court of appeals void for want of jurisdiction of the case in which it was made? But first let me ask; can this be made a question at the present day, before this or any other court in the United States? We consider it to be so firmly settled by the highest judicial authority in the nation, that it is not now to be questioned or shaken. The power of the court of appeals, to re-examine and reverse or affirm the sentence of the courts of admiralty established by the different states, though founded upon the verdicts of juries, was first considered and decided in the case of *Penhallow* v. *Doane*, in the supreme court of the United States. The jurisdiction of that court to re-examine the whole cause, as to both law and fact, was considered as resulting from the national character of an appellate prize court, and not from any grant of power by the state, from whose court the appeal had been taken. The right of the state to limit the court of appeals in the exercise of its jurisdiction, was determined to be totally inadmissible. The same question was considered by the supreme court upon the motion for the mandamus, and decided to be settled and at rest. If it were necessary to give further support to the authority of these cases, the opinion of the supreme court of Pennsylvania in *Ross's Executors* v. *Rittenhouse*, and the unanimous opinion of the old congress, with the exception of the representatives of this state, and one of the representatives of New Jersey, might be mentioned. If reasons were required to strengthen the above decisions, those assigned by the committee of congress, upon the case of the Active, are believed to be conclusive.

But I think it will not be difficult to prove that the law of Pennsylvania, passed on the ninth of September, 1778, establishing a court of admiralty in that state, neither by the terms of it, nor by a fair construction of its meaning, was intended to abridge the jurisdiction of the court of appeals in cases like the one under consideration. The words are, "that the jury shall be sworn or affirmed to return a true verdict upon the libel according to evidence; and the finding of the jury shall establish the facts without re-examination or appeal." The obvious meaning of this provision was, that if the jury found the facts upon which the law was to arise, those facts were to be considered as conclusive by the appellate court, and not open to re-examination by the judges of that court; the legislature thinking it, no doubt, most safe to intrust the finding of facts to a jury of twelve men. But what was to be done if the jury found no facts, as was the present case? If the appellate court were precluded from an inquiry into the facts, affirmance of the sentence appealed from would be inevitable. This absurdity then followed—in *all cases* it was necessary to impannel a jury to establish the facts, and in *all cases*, without

exception, the party thinking himself aggrieved might appeal. But in every case where the jury choose to find a general verdict, the sentence appealed from must of necessity be affirmed. I cannot believe that this was the meaning of the legislature; and I do not think that the words of the law will fairly warrant such a construction. Let me then put the question seriously to the jury: will they have the vanity to think themselves wiser than all those who have passed opinions upon this important *question of law?* And will they undertake to decide that those opinions were erroneous? Miserable, indeed, must be the condition of that community where the law is unsettled, and decisions upon the very point are disregarded, when they again come, directly or incidentally, into discussion. In such a state of things good men have nothing to hope, and bad men nothing to fear. There is no standard by which the rights of property, and the most estimable privileges to which the citizens are entitled, can be regulated. All is doubt and uncertainty, until the judge has pronounced the law on the particular case before him; but which carries with it no authority, as to a similar case between other parties.

But suppose, for a moment, against the settled law upon the point, that the court of appeals had not a power to re-examine the verdict of the jury, in the case of the Active; and on that account that the decree of the district court in opposition to that of the court of admiralty was erroneous, it does not therefore follow, that the district court had no jurisdiction of the case, on which this process issued. If erroneous, it could only be re-examined and corrected in a superior court. But if the subject depended upon a question of prize, or no prize, it was completely within the cognizance of the district court, by the constitution and laws of the United States; the former of which grants to the federal courts, and the latter to the district courts, *cognizance of all civil causes of admiralty and maritime jurisdiction. This is such a cause;* and we consider that circumstance to be decisive of the first point. We are happy upon this occasion, as we are upon all others, to coincide in opinion with the learned and respectable gentleman who presides in the supreme judiciary of this state.

The next ground of objection to the jurisdiction of the district court is, that the state of Pennsylvania claimed an interest in the subject of dispute between the parties in that cause.

The amendment to the constitution, upon which this question occurs, declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." It is certain, that the suit in the district court was not commenced or prosecuted against the state of Pennsylvania. She was in no respect a party to that suit. But, it is contended, that under a fair construction of this amendment, if a state claims an interest in the subject in dispute, the case is not cognizable in a federal court. In most cases it will be found that the soundest and safest rule by which to arrive at the meaning and intention of a law, is to abide by the words which the lawmaker has used. If he has expressed himself so ambiguously that the plain interpretation of the words would lead to absurdity, and to a contradiction of the obvious intention of the

law, a more liberal course may be pursued. But if upon any occasion the strict rule should be observed, it ought to be in expounding the constitution; although I do not mean to say that even in that case this rule should be inflexible. Every reason is opposed to the construction contended for by the defendants' counsel; and, to our apprehension, there is not one sound reason in favour of it. If the title to the thing in dispute be in the state, and this is made to appear to the court, it is inconceivable that the plaintiff should recover so as to disturb that right. But if he should recover, the state would not be bound by the judgment, not being a party to it. This is by no means a new case. If one individual obtains a judgment or decree against another, the interest of a third person, not a party, will not be bound or prejudiced by the decision; but he may, nevertheless, assert his right in a court of justice against the party in possession of the property to which he claims title. The state cannot be forced into court, but she may come there, if she pleases, in pursuit of her rights, and will no doubt do so upon all proper and necessary occasions.

But if, on the other hand, the mere claim of interest by a state in the subject in dispute between two citizens can have the magic effect of suspending all the functions of a court of justice over that subject, and of annihilating its decrees when pronounced, this effective and necessary branch of our government, and of all free governments, may be rendered useless at any moment, at the pleasure of a state. If the suit be prosecuted against a state, the court perceives, at once, its want of jurisdiction, and can dismiss the party at the threshold. But if a latent claim in the state, not known, perhaps, by any of the litigant parties, is sufficient to oust the jurisdiction, to annul the judgment when rendered, and to affect all the parties concerned, with the consequences of carrying a void judgment into execution, the federal courts may become more than useless: they will be traps, in which unwary suitors may be insnared to their ruin. To illustrate this position, the district attorney mentioned many very strong and very supposable cases. I will add one other. A. sues B. for a debt, or for property either real or personal in his possession. Conscious that he must pay the money or lose his possession, in consequence of the unquestionable title of his adversary, B. pays over the money, or conveys the property, even pending the suit, to a third person for the use of the state, and by this operation arrests the further progress of the suit, or avoids the judgment, whenever it shall pass. A doctrine so unjust, and big with consequences so alarming, and so fatal to the general government, should have strong and unequivocal words to support it. The court would be very mischievously employed in supplying them. We should convert this amendment, this sacrifice made to state pride, into an engine to demolish altogether one of the essential branches of the general government.

To this branch of the argument, therefore, the answer is short, but conclusive. The state is not a party, and she has no interest in the subject in dispute in the district court. The decree of the court of appeals extinguished the interest of Pennsylvania in any share of the Active and her cargo, and vested the full right to the whole in Olmsted and his associates, who might rightfully follow that part of the proceeds which came into the hands of the representatives of Rittenhouse, who held them as stakeholders for whoever

might have title to them. Rittenhouse himself held them in his private capacity, and not as treasurer, for his individual security against the bond given to Ross, and which was still outstanding when this decree was rendered. I know not how this part of the subject can be made plainer.

There is another objection to the argument drawn from the interest of the state, which was not satisfactorily answered by Mr. Ingersoll, to whom it was stated by the court during the discussion. By the constitution of the United States the judicial power extends to all controversies between a state and citizens of another state, whatever might be the nature of the controversy, and no matter as to the court to which the cause might be assigned by the legislative distribution of the judicial powers. That amendment declares that the above provision shall not be construed to extend to any suit in law or equity commenced or prosecuted against a state by a citizen of another state, or an alien. This was not a suit at law, or in equity, but in a court of the law of nations, and in a case of admiralty and maritime jurisdiction. The question put to the learned counsel was, "is such a case excluded from the cognizance of the district court by this amendment?" The answer given was, that the amendment ought to be so construed, this case being equally within the mischief meant to be remedied: that is, the court is bound to supply the words "or to cases of admiralty and maritime jurisdiction." Would we be justified by any rule of law in admitting such an interpolation, even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our various struggles to get at the spirit and intention of the framers of the constitution, I fear that this invaluable charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured, that its founders would recollect very few of its original features. But there appears to be a solid reason for the limitation of the amendment to cases at law and in equity. And this will throw some light upon the preceding branch of this argument. Suits at law and in equity cannot be prosecuted against a state without making her a party, and the judgment acts directly upon her. But in what manner was the execution to be made effectual? The subject was a delicate one, and it was thought best to avoid having it practically tested. But in cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are *in rem*. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and after the decree is passed say she was a party, and, therefore, not bound for want of jurisdiction in the court. This doctrine, in relation to the proceedings of a court of the law of nations, and in which all nations are interested, might be productive of the most serious consequences to the general government, to whom are confided all our relations with foreign governments. As at present advised, then, we think that the amendment to the constitution does not extend to suits of admiralty and maritime jurisdiction.

The second ground of justification is founded upon the orders of the go-

[Olmsted's Case.]

vernor of this state, issued, as it is contended, under the sanction of a law of the state. Whether the true meaning of that law has been mistaken or not, it would perhaps ill become this court to decide; but it will not, I trust, be deemed indecorous if we express a hope that it was so. It is more agreeable to think that an individual should have been mistaken in his judgment (and in this case we are bound to think that the error, if any, was not of the heart) than that the legislature should have intended so open an attack upon the constitution and government of the United States. But if such was the design of the law, we must lament the circumstance, and must, without reserve, pronounce it to be unconstitutional and void. Upon what is the law predicated? Upon the invalidity of the sentence of the district court. But have the people of the United States confided to the legislatures of the states, or even to that of the United States, the power to declare the judgments of the national courts null and void? Could such a power be granted to them without sapping the foundations of the government and extinguishing the last spark of American liberty? It is a truth not to be questioned, that the power to declare the judgments of your courts void can never be safely lodged with a body who may enforce its decision by the physical force of the people. This power necessarily resides in the judicial tribunals, and can safely reside nowhere else. Whether a state court is competent to declare a judgment of a federal court void for want of jurisdiction need not now be considered. It may, however, be observed, that admitting the right in the first instance, the ultimate decision of the question belongs to the supreme judicial tribunal of the nation, if that decision be required; for the judicial power extends to all cases arising under the constitution, and the laws of the United States made in pursuance thereof; and the twenty-fifth section of the judicial law, with a view to secure to the national judiciary this important privilege, vests in the supreme court a power to review and affirm, or reverse, the decision of the highest court of law or equity in a state, where a question depending upon the construction of any clause in the constitution, treaty or statute of the United States had been decided against the title, &c., claimed under the constitution, &c. It seems, however, that this power is considered as being unsafely lodged in the national courts, because it may be abused for the purpose of drawing every case into the vortex of the federal jurisdiction. Whence can arise this jealousy? Had the judges of those courts, or of any courts, an interest in extending the sphere of their jurisdiction? Quite otherwise: as the jurisdiction of the court is abridged, the labour of the judge is diminished. Is it a privilege which is claimed for the advantage of the court or of the individuals who compose it? By no means. It is the privilege of the citizen, and as long as I have the honour of a seat on the bench, I will consider myself one of the guardians of this privilege, (a very feeble one I acknowledge,) and with a steady and unvarying eye, fixed upon the constitution as my guide, I shall march forward, without entertaining the guilty wish to limit this privilege, where the citizen may fairly claim it, or the desire, not less criminal, to enlarge its boundaries, because it is claimed.

If then the validity of the decree of the district court be established upon the ground of reason, upon the basis of the constitution—in part upon the opinion of congress and decisions of the supreme federal and state courts,

more than once given, what follows? That the governor of this state had no power to order the defendants to array themselves against the United States, acting through its judicial tribunals; and the legislature of the state was equally incompetent to clothe him with such a power, had it so intended. The defendants were bound by a paramount duty to the government of the union, and ought not to have obeyed the mandate. There were but two modes by which the general government could assert the supremacy of its power on this occasion: by the peaceful interference of the civil authority, or by the sword. The first has been tried, and the defendants are now called to answer for their conduct before a jury of their country. Will any man be found bold enough to condemn this mode of proceeding, or complain that this alternative has been chosen? But if the accused can plead the orders of the governor as a justification of their conduct; and if the sufficiency of such a plea is established; the civil authority is done away, its means are inadequate to its end, and force must be resorted to. Are we prepared for such a state of things? The doctrine appears to us monstrous—the consequences of it terrible. We regret that it was broached. It was contended, that in a case where a state government authorizes resistance to the process of a federal court, though in a cause wherein the court had competent jurisdiction, the only remedy in such an emergency is negotiation. If there were no federal, no common head, this position might be admitted, and on the failure of the negotiations, the *ultima ratio* must be resorted to. But under our constitution of government, which declares the laws of the United States, made in pursuance of that instrument, the supreme law of the land, and which vests in the courts of the United States jurisdiction to try and decide particular cases, I am altogether at a loss to conceive how, in the case stated, negotiations between the general and paramount government, in relation to the powers granted to it, and a state government, can be necessary, and could ever be proper. I speak not of the power, but of the right of resistance.

But it is contended that the defendants, standing in the character of subordinate officers to the governor and commander in chief of the state, were bound implicitly to obey his orders; and that although the orders were unlawful, still the officer and those under his command were justifiable in obeying them. The argument is imposing, but very unsound. In a state of open and public war, where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there, the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of the country.

In the case of *Little* v. *Barreme*, the supreme court of the United States felt every motive which could affect them as men to excuse an unlawful act performed by a meritorious officer. He was at sea, without the possibility of consulting with counsel, or others, as to the legality of the act he was about to execute, and which appeared to him to be authorized by the chief executive magistrate of the nation in the instructions received from the navy department. Notwithstanding all these powerful pleas in his favour; pleas

which were addressed strongly to the feelings of those who were to decide on his case, the supreme court conceived that the law of the land did not warrant the instructions given, and consequently that the officer was not justified in what he did. I am not sure, but I am induced to think that he afterwards obtained relief from congress.

This is said to be a hard case upon the defendants, because if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case; but with this you have nothing to do if the law is against the defendants. It may, however, be observed, that had the defendants refused obedience, and been prosecuted before a military or state court, they ought to have been acquitted, upon the ground that the orders themselves were unlawful and void, and we ought of course to suppose that they would have been acquitted.

We enter not into the political discussions which have been so ably conducted on both sides; but we admonish you to discard from your minds all political considerations, all party feelings, and all federal or state prejudices. The questions involved in this case are in the highest degree momentous, and demand a cool and dispassionate consideration. We rely upon your integrity and wisdom for a decision which you can reconcile to your consciences, and to the duties which you owe to God and to your country.

The jury found the following special verdict:—And now, to wit, on this first day of May, in the year aforesaid, the jurors, sworn and affirmed, and impannelled, as aforesaid, upon their oaths and affirmations aforesaid, do find, that on the said 25th of March, 1809, in the city of Philadelphia aforesaid, that the defendants did, knowingly and wilfully, obstruct, resist, and oppose the said John Smith, then and there being an officer of the said United States, to wit, the marshal of the district of Pennsylvania, in attempting, then and there, to serve and execute the said judicial writ of arrest in the indictment mentioned, and that the said defendants then and there acted under the orders of the constituted authorities of the commonwealth of Pennsylvania, in so obstructing, resisting, and opposing the said marshal, as aforesaid, and whether, upon the whole matter, the law is in favour of the United States, or of the defendants, the jurors aforesaid refer to the consideration of the court: and if the court are of opinion, that the law is for the United States, then the jurors aforesaid do find the defendants, and every of them, guilty; but if the court are of opinion that the law is for the defendants, then they find the defendants not guilty.

At a subsequent day, judgment was entered on the verdict in favour of the United States, and Gen. Bright was sentenced to be imprisoned for three months and to pay a fine of $200; and the other defendants to one month's imprisonment and a fine of $50 each; but they were immediately pardoned by the president of the United States.

Com. ex rel. Van Ritter *v.* Schultz.

[OCTOBER, 1816.]

An agreement between the master of a vessel and a passenger, that the latter shall remain on board until he has paid his freight, is lawful. He cannot plead, as a set-off, that the master did not furnish the provisions which he stipulated. These are mutual covenants, on which each party may have an action.

HABEAS CORPUS, returnable before the chief justice. The facts of the case sufficiently appear in the opinion of the court.

TILGHMAN, C. J.—It appears by the return to the habeas corpus and the evidence which has been given, that the relator, Franz Anthon Van Ritter, was a passenger, together with many others, Germans and Swiss, in the brig Ceres, from Amsterdam to Philadelphia, and the defendant Captain Schultz, detains him on board the said brig, now lying in the Delaware, off Philadelphia, by virtue of a contract made between the captain and passengers at Amsterdam, by which the passengers agreed not to leave the brig without permission of the captain, until payment of their passage money. It is contended by Van Ritter in the first place, that this contract, so far as concerns the engagement not to leave the brig, is illegal and void—but that even if it were valid, the captain having not performed his part of the agreement has no right to detain him.

The contract is said to be illegal, because it is oppressive and unconscientious, and because it is against the public interest and general policy of the country.

It is not pretended that the passengers in this vessel are to pay more than the usual freight; or that any deception was put upon them at the time of entering into the contract. They came on board in the usual way, and made such an agreement for their passage as is commonly made.

Having no money, nor being able to find security at Amsterdam, they stipulated not to leave the brig till they had paid for their passage. They knew very well that they could make no money during the passage, nor could they expect to borrow it on their arrival in a strange country. But it was also known that by indenting themselves to serve for a term of years, the money might be raised; and in order to secure the captain who carried them over the sea and supplied them with provisions, they promised not to leave the brig until they had paid for their passage, which in substance amounted to an engagement to raise the money by indenting themselves before they left the brig. Their object was to advance their fortunes in a new country, an object which had been frequently attained by their countrymen, who had gone to America before them —and it is not easy to conceive any better means of accomplishing their object than those which were taken. Supposing then the contract to have been fairly complied with on the part of the captain, I can perceive nothing in it unreasonable and unconscientious; on the contrary, it was advantageous to the emigrants. Having no money, they obtained credit by giving the only security in their power, a security which, if not abused on the part of the captain, could be productive of no hardship whatever.

But it is said to be against the general policy of our laws and government. If it be so, it must be either because of the indenture of servitude, or because of the right of the captain to detain the passengers until they enter into such indenture. Upon consideration of our laws and customs, it is extremely clear, that an indenture of this kind is not only not against our policy, but that it is conformable to the policy and custom which has prevailed from the earliest times. In the case of the *Com.* v. *Keppele*, 2 *Dall. Rep.* 197, this subject was maturely considered, as appears from the opinion of Judge Bradford, who, as is well known, was remarkable for deep and accurate re-

search. He states this custom of persons coming from Europe binding themselves and their children as servants in America to pay for their passage, as having originated with the first adventurers to Virginia. It arose from the circumstances of the country, and being found eventually beneficial to the merchant and the adventurer, it has never ceased, but was introduced into Maryland and Pennsylvania, which were colonized after Virginia. We find it referred to in our statute book so early as the year 1700, in fact, there was a convenience in it so obvious that it could not be relinquished. It has been the favourite policy of Pennsylvania to encourage particularly the importation of Germans. The name of German redemptioner, which implies servitude, is familiar to her laws. Servitude of this kind is no disgrace; and the soundness of the policy which encouraged it is proved by this notorious fact—that many of the redemptioners, having honestly served out their time, have risen to eminence both of character and fortune, and the same remark is applicable to many who have been imported from Great Britain and Ireland. Our laws have paid particular attention to Germans, because we seem to have expected a greater emigration from Germany than from any other country—because we considered them as a steady, sober, industrious people, remarkably fitted for agriculture—and because, being ignorant of our language, they stand more in need of legislative protection than the emigrants from our mother country. Accordingly, we find, that on the 8th April, 1785, an act was passed "for establishing the office of a register of all German passengers who shall arrive at the port of Philadelphia, and of all indentures by which any of them shall be bound servants for their freight, and of the assignment of such servants in the city of Philadelphia." This act contained many provisions beneficial to the Germans, and by another act passed 12th March, 1810, "all masters or mistresses of German redemptioners who are minors, and who shall arrive at the

port of Philadelphia after the passing of said act, shall give to the said redemptioners six weeks' schooling for every year of his or her time of servitude, and it shall be the duty of the register of German passengers to insert the same fully in their indentures." It cannot be denied, therefore, that this kind of servitude has been recognised and provided for by our laws, so that it only remains to consider whether the right to detain the passenger on board till he pays the money, or, in other words, till he indents himself, is contrary to the genius of our laws or constitution.

If we wish for the importation of Germans who have not money to pay their passage, we must permit the merchant who imports them to have security for his freight. Now in what other way can these people give security, than agreeing to remain on shipboard till they indent themselves as servants? I confess that none has occurred to me, nor has any been suggested by the learned counsel who have argued for the relator. They have said, indeed, that the passenger may agree in Europe to indent himself on his arrival in America, and the ship-owner may sue him if he does not comply with his contract. But what security is there in that? The owner might as well have rested on a simple promise to pay the freight.—And what advantage would the honest passenger derive from being sued on his contract? A fraudulent man indeed might think it for his interest to go to jail, and come out by the insolvent act; but one who meant to act fairly would rather remain on board till he had raised the money, than to subject himself to an action for the freight merely for the sake of setting his feet on shore a few days sooner. But it is objected that private imprisonment is odious and intolerable. I grant it, and should not be for ordering it—but how can this be called private imprisonment? Have not our laws provided that public officers shall visit the ship, and examine the condition of the passengers? Is

there not free access for the friends of the passengers, for strangers who wish to contract for their service, and for the members of that respectable society whose object and duty it is to afford relief to their countrymen in distress?—If this access were denied, it might then indeed be called a private imprisonment, for which this court would give immediate redress. Supposing then this right of detention to be exercised with mildness and humanity, according to the true meaning of the contract, I perceive nothing in it either inconsistent, oppressive or impolitic; and in this sentiment I am supported by an authority no less than the legislature of the commonwealth—for, by an act passed 22d of April, 1794, (sect. 13,) "it shall be lawful for the master, captain or owner, or consignee of any ship or vessel, importing passengers into this commonwealth as aforesaid, to keep and detain any such passengers who are unable to pay their freight, on board the same ship or vessel wherein they were imported respectively, for the space of thirty days after their arrival opposite the city of Philadelphia, in order that they may have time to find out relations or friends, who may discharge their freight, or to agree with some person or persons, who shall be willing to pay the same in consideration of their servitude for a term of years, agreeably to custom."

The above is part of a law for establishing a health office, &c. The laws concerning the health office are various and complicated—several have been made and several repealed, in whole or in part. As the passage I have cited was not mentioned in the argument, I presume it was supposed to be repealed. I will not take it upon me to assert positively that it is not repealed; but after a pretty diligent search, I have not been able to find the repeal. If it be still in force, the right of detention is clear, because the thirty days given by the law have not expired. But even supposing it to be repealed, I am of opinion, for the reasons I have given, that the right still

remains, in cases where the contract expressly stipulates for it.

But it is contended that the defendant, by violating his part of the contract, has forfeited his right of detention, because the stipulations on his part are in nature of a condition precedent, which must be strictly performed before he can have any remedy on the contract. This, however, is not the construction of the agreement. The word condition is indeed to be found in it, but on the whole, it appears to be an agreement in which there are mutual covenants, on which each party may have an action, although he may not have strictly complied with every thing to be done by him. The captain agrees to bring the passengers to America, and furnish them on each day of the passage with certain articles of provision—on the other hand, the passengers promise to conduct themselves in an orderly and peaceable manner, and pay their freight at the end of the voyage. But it never could have been intended that if the captain failed in some small article on one day, he should therefore have nothing for bringing the passengers across the Atlantic; or that a passenger by one trifling act of rudeness or misbehaviour should forfeit all right to the benefit of the agreement. Van Ritter has been safely brought to America, which is the main point. For this he certainly must pay something, although he may have claims against the captain for breaches of the contract. Some breaches there certainly have been. I allude not to those acts of violence, rudeness and indecency done by the officers of the brig (though not by the captain personally) to many of the passengers, and particularly females. Although I highly disapprove of these things, yet they cannot properly be taken into consideration in the present inquiry. Personal injuries to others are not the concern of Van Ritter. For the beating of his wife indeed he has an intimate concern, but it is not a wrong of a nature that can be set off against the captain's claim to

freight. But when I say that the contract has been broken, I mean in the article of provisions. Potatoes and vinegar were not furnished at all, and as to the rest, the passengers were put upon short allowance during great part of the voyage. It is insisted indeed by the captain that this short allowance arose from necessity. It is a point on which I am not fully satisfied; but a jury will decide it, if it should ever be brought before them. But granting that there have been breaches of this contract, how can I measure the damages? It is a thing which, without the assistance of a jury, I could not pretend to. The question then is whether, supposing for argument's sake, the claim of freight to be liable to some deduction, the captain therefore forfeits all right to detention. It appears to me that he does not; and that the right of detention remains until the whole balance of freight is paid. The agreement is, that the freight shall be paid, and the passengers shall stay on board until it is paid; that is, until the whole is paid. If, upon mature reflection, it shall be thought by the German society, that this is a case which requires further investigation, they will no doubt support the passengers in the prosecution of their rights. I see some of the members of that society attending here, and am glad to see them; they may render essential service by making a strict but dispassionate inquiry into the conduct of all captains who arrive at this port with passengers; by discouraging all litigations about trifles, but firmly supporting their countrymen against every species of oppression and every substantial breach of contract: on their conduct much depends.—Their duty is important; and in the discharge of it they may do much good, or much ill.—That they will choose the good I hope, and I have no reason to doubt it. Upon the whole, it is my opinion that Van Ritter should return to the brig, and remain there, according to his agreement.

Com. ex rel. Chew *v.* Carlisle.

[FEBRUARY 5, 1821.]

Unless it clearly appears that a prisoner brought up on *habeas corpus* is entirely innocent, the judge is bound to bail or remand.

A combination is criminal when the act to be done has a necessary tendency to prejudice the public, or to oppress individuals, by unjustly subjecting them to the power of the confederates.

THE relators were brought by habeas corpus before Mr. Justice GIBSON, at the sittings at nisi prius for the city and county of Philadelphia, on the 5th of February, 1821. The return set forth, that the relators were in custody under a commitment from Alderman Barker, on a charge of conspiracy by the oath of a certain Peter Voorhees. It appeared they were master ladies shoemakers, and that they had agreed with each other not to employ any journeyman who would not consent to work at reduced wages: but it also appeared that the object went no further than to re-establish certain rates which had prevailed a few months before, from which, there was reason to believe, the employers had been compelled to depart, by a combination among the journeymen. A motion to discharge, on the ground that a combination to regulate wages is no offence by the common law of Pennsylvania, was now argued by *Brown* and *King* for the relators, and *Scott* and *Dallas* for the commonwealth.

GIBSON, J.—Unless it clearly appears that a prisoner brought up on habeas corpus is entirely innocent, the judge is bound to bail or remand. But difficulty or hesitation as to the law, arising from facts indisputably established, is not that kind of doubt of guilt which justifies in refusing to discharge, where the mind inclines, after full consideration, to pronounce in favour of innocence. On all questions of law, arising in the course of the investigation, the

prisoner is entitled to the benefit of the judge's decision; and although he may regret the necessity of encountering an unsettled principle without the assistance of his brethren; yet, being legally competent, he is bound to meet all questions of law; for he trifles with the rights of the prisoner and the liberties of the citizen, as secured by the habeas corpus act, when from timidity he delegates his functions to another tribunal, and refuses to decide on the only ground on which the prisoner rests his claim to be discharged. The argument then that I am bound to remand if I have the least doubt, holds only as to doubt of the truth of the facts in evidence, with respect to which the commonwealth as well as the prisoner has a right to go before a grand jury, who are the constitutional judges in that particular; but as to refusing to decide necessary questions of law, I have no discretion.

In no book of authority has the precise point before me been decided. *Rex* v. *The Tailors of Cambridge* is found in a book (8 *Mod.* 10) which can claim nothing beyond the intrinsic evidence of reason and good sense apparent in the cases it contains. In the trial of the boot and shoemakers of Philadelphia, there was no general principle distinctly asserted, but the case was considered only in reference to its particular circumstances, and in these it materially differed from that now under consideration. And in the trial of the journeymen cordwainers of New York, the mayor expressly omits to decide whether an agreement not to work, except for certain wages, would be indictable *per se*. There are, indeed, a variety of British precedents of indictments against journeymen for combining to raise their wages; and precedents rank next to decisions as evidence of the law; but it has been thought sound policy in England to put this class of the community under restrictions so severe, by statutes that were never extended to this country, that we ought to pause before we adopt their law of conspiracy, as respects artisans, which may be said

to have, in some measure, indirectly received its form from the pressure of positive enactment, and which therefore may be entirely unfitted to the condition and habits of the same class here. An investigation of the principles of the law which declares the offence, then, becomes absolutely necessary to a correct decision in this particular instance; and I at once proceed to it: whether there are not questions of fact proper for the consideration of a jury, as being material to the relators' defence, may, in case I find myself bound to remand them, be a fit question for consideration.

The unsettled state of the law of conspiracy has arisen, as was justly remarked in the argument, from a gradual extension of the limits of the offence; each case having been decided on its own peculiar circumstances, without reference to any pre-established principle. When a combination had for its direct object to do a criminal act; as to procure the conviction of an innocent man (the only case originally indictable, and which afterwards served as a nucleus for the formation of the entire law of the subject) the mind at once pronounced it criminal. So where the act was lawful, but the intention was to accomplish it by unlawful means; as where the conviction of a person known to the conspirators to be guilty, was to be procured by any abuse of his right to a fair trial in the ordinary course. But when the crime became so far enlarged as to include cases where the act was not only lawful in the abstract, but also to be accomplished exclusively by the use of lawful means, it is obvious that distinctions as complicated and various as the relations and transactions of civil society, became instantly involved, and to determine on the guilt or innocence of each of this class of the cases, an examination of the nature and principles of the offence became necessary. This examination has not yet been very accurately made; for there is in the books an unusual want of precision in the terms used to describe the distinctive fea-

tures of guilt or innocence. It is said the union of persons in one common design is the gist of the offence: but that holds only in regard to a supposed question of the necessity of actual consummation of the meditated act; for if combination were, in every view, the essence of the crime, it would necessarily impart criminality to the most laudable associations. It is said in Leach's note to Hawkins, b. i, ch. 72, § 3, that the conspiracy is the gist of the charge, and that to do a thing lawful in itself by conspiracy, is unlawful; but that is begging the very question, whether a conspiracy exists, and leaves the inquiry of what shall be said to be doing a lawful act by conspiracy, as much in the dark as ever. Mr. Chitty, in his Criminal Law, (vol. iii, page 1139,) the best compilation on the subject extant, very truly says, there are many cases in which an act would not be cognizable by law, if done by an individual, that would, nevertheless, be the subject of an indictment if effected by several with a joint design: yet he, too, says the offence depends on the unlawful agreement, and not on the act which is to follow it: the act when done being but evidence of the agreement. From this it might be inferred that the act can operate only to show that an agreement of some sort has taken place, but not by its nature or object to stamp the character of guilt on it; but Chitty himself admits that it is impossible to conceive a combination, merely as such, to be illegal. It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary con-

sequence. To give appropriate instances respectively referable to each branch of this classification of criminal intention:—if a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighbouring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined. not for the purposes of oppression, but fair competition with others of the same calling. So with respect to the other branch: if the bakers of a town were to combine to hold up the article of bread, and by means of a scarcity thus produced, extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable; and to one or other of these, may the motive in every decided case be traced. Thus a combination to marry, under feigned names, was criminal, because the object was to affect the interest of a particular parish under the poor laws, or to injure an individual by setting up a colourable title to his estate; an agreement between the officers of an army to throw up their commissions simultaneously, in a time of public danger, or between a number to hiss a play, right or wrong, was indictable; because there was an unmixed motive of mischief to the public or an individual. So, on the other hand, in a confederacy to raise the price of the funds, to sell bad liquors, or to procure the release of a prisoner by entering insufficient bail, the motive is not prejudice to the public or an individual, but undue gain to the confederates or their friends; which is unlawful only in reference to the means used to procure it. I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the

wages of journeymen below what they would be, if there was no recurrence to artificial means by either side, is criminal. There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest on that of any other individual, beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for purposes of commerce, or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs, which stimulates to competition and enables men to engage in undertakings too weighty for an individual. It would, I grant, be impossible for the employers in any branch of manufactures to produce a permanent depression of wages, because others would find it their interest to embark in the business on more liberal terms; and these, by a just compensation for labour, would have a monopoly of all the journeymen—they would ultimately ruin those who should adhere to the system of depression. The competition of interest must eventually break up every combination of the kind. But though every plan of coercion must recoil on those who put it in practice, it may occasion much temporary mischief to others. The journeymen are compelled to enter, with their employers, into "the

unprofitable contest of who can do the other most harm," or submit to work for such prices as the latter may choose to give. Hence, precisely the same oppressive consequences to this class, as would result to the community from a confederacy among the bakers to extort an exorbitant price for bread, which every one will acknowledge to be indictable. The labouring classes purchase their bread with their labour, or, what is the same thing, they give their labour for the money with which they purchase bread, and it is evident the more labour is depreciated, the more of it will be required to purchase any given quantity of bread. It must be evident therefore, that an association is criminal when its object is to depress the price of labour below what it would bring, if it were left without artificial excitement by either masters or journeymen, to take its chance in the market. But the motive may also be as important to avoid, as to induce an inference of criminality. The mere act of combining to change the price of labour is, perhaps, evidence of impropriety of intention, but not conclusive; for if the accused can show that the object was not to give an undue value to labour, but to foil their antagonists in an attempt to assign to it, by surreptitious means, a value which it would not otherwise have, they will make out a good defence. In the trial of the journeymen shoemakers of Philadelphia, the recorder, a lawyer of undoubted talents, instructed the jury that it was "no matter what the defendants' motives were, whether to resist the supposed oppression of their masters, or to insist upon extravagant wages;" but this, although perfectly true as applicable to that case, where the combination was intended to coerce not only the employers but third persons, is not of universal application. A combination to resist oppression, not merely supposed but real, would be perfectly innocent: for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy. It

is a fair employment of means not criminal in the abstract, but only so when directed to the attainment of a criminal object; and it is therefore idle to say the law affords a remedy to which the parties must recur: the legal remedy is cumulative, and does not take away the preventive remedy by the act of the parties. It would be an assumption of the question to say it is criminal to do a lawful act by unlawful means, when the object must determine the character of the means. It must therefore be obvious that the point in this case is, whether the relators have been actuated by an improper motive; and that, being a question purely of fact, I am bound to refer its decision to a jury, the constitutional tryers of it; but as I was necessarily led into an examination of principles that might have an unfavourable operation on the relators, I owed it to them, particularly as there was some evidence of combination on the part of the journeymen who prosecute, to state also those principles that may possibly operate in their favour; so that the cause may go before the proper tribunal unprejudiced by any observations of mine. In the mean time I am bound to remand them.

On hearing this decision, the relators applied to be discharged on entering into recognizance for their appearance at the next session of the mayor's court, and the counsel for the commonwealth consenting, they were accordingly bound in $200 each.

Commonwealth *v.* Dupuy et al.

[FEBRUARY 23, 1831.]

Where one or more individuals contribute sums of money to employ counsel to carry on a criminal prosecution, it is not maintenance in them to do so, nor does the fact of their so doing go to impeach their credit; though if such aid be given through malicious motives, and without probable cause, they render themselves liable to an action for damages at the suit of the party so prosecuted.

When three or more persons agree to go to a church where divine service is to be performed, and to laugh and talk during the performance of the same in a manner which might be excusable in a tavern; and in so doing manifest a determination to resist by force any effort that may be made to remove them or prevent their so doing, they will be guilty of riot.

It *seems* that the unnecessary performance of secular labours on Sunday, in such a way as to disturb the worship of others, is indictable in Pennsylvania.

THE defendants were indicted for a disturbance alleged to have been committed in the Wiccaco Church, in the county of Philadelphia, where they had met, on Sunday, May 31, 1829, for the purpose of protesting against the preaching of the Rev. Mr. Connelly, whose authority to act as minister they disputed. It appeared that the congregation having assembled, Mr. Connelly attempted to take his place in the pulpit, when one of the defendants interrupted him by telling him he was not the choice of the congregation, handing him a letter to that effect, which he was requested to read. A disturbance ensued, and the result was that Mr. Connelly was forced to withdraw from the Church.

KENNEDY, J., before examining the evidence, which he afterwards did at great length, said:—It has been said that the principal witnesses on the part of the commonwealth, have contributed sums of money to employ counsel to aid in carrying on the prosecution, and that in doing so they have been guilty of the crime of maintenance, which

is an indictable offence, and ought to impeach their credit. This I consider a misapplication of the term *maintenance*, which is committed by a person who has no interest or concern in the cause, therein inciting or stirring up one man to sue another; or it may be committed by such a person in supplying money to commence and carry on suits with which he has no concern. If, however, he should be the guardian or parent of the plaintiff, he will be excused; or be otherwise interested in the matter, he will be justified. Interest in the cause of action is sufficient to justify his interference; and if so, it is manifest that maintenance cannot be committed by any one of the community in taking a part in commencing and carrying on a prosecution in the name of the commonwealth, charging the defendants with a public offence, because he has an interest, a deep interest, I would say, in bringing to justice all such as have been guilty of a public offence. Every individual of the community may be considered as a plaintiff in such cases. And we know that it is every day's practice for individuals, private citizens, to take an active part in public prosecutions, and employ counsel to aid the attorney appointed for the commonwealth in conducting and attending to their prosecutions. The motives which induce private citizens thus to interfere in public prosecutions, may be commendable or otherwise. If they do commence and carry them on from malicious motives, and without any probable cause for doing so, they render themselves liable to an action for damages at the suit of the party so prosecuted. If you have discovered that any or all of the witnesses on the part of the commonwealth were under the influence of bad motives in giving their testimony, you no doubt will feel yourselves disposed to make proper allowance for it.

The counsel who first addressed you on behalf of the defendant admitted that the manner of doing the act which is charged as riot is every thing, and may make that crimi-

nal and amount to a riot, which, when done in a different manner, may be laudable. This is certainly so; but then I understood him to contend that although the time and place might aggravate the offence, they can never make that an indictable offence which otherwise would not be so. To the truth of this proposition I cannot give my assent. I consider that the place in which a thing is done may be of as much importance in making the act a public offence or otherwise, as the manner of doing it. It is laid down as law, and I have no doubt it is so, that a man may call in his friends completely armed to defend and protect himself against a threatened assault in his own house, but if he go abroad thus attended by two or more, with a view to defend himself against a threatened attack, unless indeed it should be to go to the magistrate to make his complaint, it would be considered a riot. The place, in this case then, becomes of the essence of the crime. Can it be doubted for a moment that if three or more agree to go to church when divine service is to be performed, and to laugh and talk during the performance of the same, and behave in such a manner as would be excusable in a tavern, and, in doing so, manifest a determination to resist by force any effort that may be made to remove them or prevent them from doing so, that they would not be guilty of a riot? I would consider it a most aggravated one; yet it is only rendered so by the time and place. Doctor Collin no doubt felt the influence of this distinction, when he came to his door, as is testified, and admonished those who were assembled in his yard making a noise by loud talking, such as had not been usual in that place, that they were not in a tavern.

I also consider it a great mistake to say that you may do in Pennsylvania on the first day of the week, or more commonly called Sunday, whatever you may do on any other day of the week. Without waiting to inquire whether or not God has, as Mr. Dupuy, one of the de-

fendants, said, made all days alike, and whether the distinction be of divine appointment or not, it is sufficient to know that the legislature of Pennsylvania have passed acts restraining and prohibiting the doing of certain acts, and prescribing a certain course of conduct on that day. It is forbidden that we should engage in, and follow our usual occupations, unless, indeed, it should be that our daily labour was that of performing acts of necessity or mercy, which are lawful at all times and seasons. The policy of these acts, I think, ought not to be questioned. I presume it will be admitted, by an intelligent mind, that religion is of the utmost importance to every community. The history of the past furnishes abundant evidence of the truth of this proposition. It is the basis of civilization. Without it we should be in a state of moral darkness and degradation, such as usually attend the most barbarous and savage states. It is to the influence of it, that we stand indebted for all that social order and happiness which prevails among us. It is by the force of religion more than by that of our municipal regulations, or our boasted sense of honour, that we are kept within the line of moral rectitude, and constrained to administer to the welfare and comfort of each other. In short, we owe to it all that we enjoy, either of civil or religious liberty. Blessings which certainly cannot be too highly appreciated, but ought not, as the defendants are said to have done upon this occasion, to be used as a cloak to cover a design to disturb the public peace, and to promote a sinister end. Here, then, give me leave to say, that the institution of the Sabbath is, in my humble opinion, not only admirably adapted to promote and establish religion among us, but to secure and preserve our physical as well as moral health and strength.

That this congregation, or some portion of it, was assembled for the purpose of joining in public worship, we may reasonably conclude was the fact; and that such a disturbance was created and produced as to break it up,

and prevent public worship from taking place, seem to be testified to by most of the witnesses on both sides.*

* Persons who profess the Jewish religion, and others who keep the seventh day as their Sabbath, are not exempted from the penalties inflicted by the act of 22d April, 1794, upon those who do worldly employment on Sunday. *Com.* v. *Wolf*, 3 S. & R. 48. This decision was lately reviewed and affirmed in the case of *Specht* v. *Com.*, 8 Barr 312, where it was determined that there is nothing in the first section of the act of 1794, for the prevention of vice and immorality, which conflicts with the constitution of Pennsylvania.

Insurance Co. *v.* Union Canal Co.

[JANUARY, 1843.]

Equity disregards preferences which cannot be enforced at law, wherever it has exclusive control of the fund on which they seem to act; and it respects them only where to do otherwise would merely turn the party around to another tribunal.

A party cannot have the aid of a chancellor in executing a contract, when by his own laches the rights of third persons, without notice, have intervened, which will be prejudiced by the action asked for.

Though an agreement which is to be perfected by the execution of an instrument is among the few exceptions to the rule that equity does not decree specific performance of a contract relating exclusively to a personal chattel, it is nevertheless open to all the objections that could, in equal circumstances, be made to the execution of a contract for the purchase of lands; and against a bill to enforce such a purchase, a delay of fifteen years would be decisive.

If a mistake exist, not in an instrument which is intended to give effect to a preliminary agreement, but in the agreement itself, and it is shown to have been produced by ignorance of a material *fact*, equity will relieve according to the nature of the case; but if the agreement was not founded on such mistake, equity will not decree another security to be given, different from that which had been agreed upon, or treat the case as if the other security had been actually executed.

The 26th section of the act incorporating the Union Canal Company authorized them "to raise by way of loan, from any individuals or bodies corporate, on such terms or conditions as they might think fit, such sums of money as they might from time to time find expedient, for the completion of the objects aforesaid, upon the credit of the capital stock and incorpora-

[Insurance Co. v. Union Canal Co.]

tion, including the net proceeds and avails of the lottery, and tolls and profits of the same; *and for the fulfilment of the terms and conditions of any such loan, to mortgage any part or the whole of their property, tolls, profits, or estate whatever.*" In pursuance of this power, the company resolved to borrow 550,000 dollars, and pledged, for the redemption of the loan, their works, accomplished or to be accomplished, &c.; and the complainants lent them money on the terms indicated, but instead of insisting on a formal mortgage, took a certificate, with a marginal memorandum, which bore that certain funds were pledged for its redemption by the resolution referred to. *Held*, that this was not a mortgage within the meaning of the act, and that after the lapse of fifteen years, intervening creditors having been induced, by the complainants' omission to exact a mortgage, to advance money on the credit of the funds, a chancellor would not entertain a bill to execute the contract between the complainants and the company, by converting it into a mortgage under the act of assembly.

IN EQUITY. Bill for specific performance, by the Insurance Company of North America *et al.* against the Union Canal Company *et al.*

The opinion of the court was delivered by

GIBSON, C. J.—I am asked to compel the company to execute a mortgage of its works to the complainants, or declare the latter to be entitled to a preference under the mortgage executed to Mr. Roberts in trust for the general creditors; to decree that the company pay the complainants the whole of their principal and interest in preference to any other class of its creditors; that it come to an account of the tolls received, and apply the tolls which may accrue to the interest due to the complainants; that it be restrained, in the mean time, from increasing the dimensions of its canal, or suffering any incumbrance on its property, or from applying its resources to any other object than the redemption of the complainants' loan. These prayers for different forms of relief are founded on the supposed right of the complainants to be preferred to the subsequent loan-holders, and this right, whatever it may be, depends on the twenty-sixth section of the act of incorporation, which authorized the company "to raise by way of loan, from any individuals or bodies corporate, on

such terms or conditions as they might think fit, such sums of money as they might, from time to time, find expedient for the completion of the objects aforesaid, upon the credit of the capital stock and incorporation, including the net proceeds and avails of the lottery, and tolls and profits of the same; and for the fulfilment of the terms and conditions of any such loan, to mortgage any part or the whole of their property, tolls, profits or estate whatever." It will be perceived from this, that the instrument prescribed to fulfil the terms of the agreement, and thus secure a preference, was to be a mortgage; and that unless the complainants are legal or equitable mortgagees, they are not entitled, by force of the statute, to any preference whatever.

In pursuance of its power, the company resolved to borrow 550,000 dollars, and pledge, for the redemption of the loan, beside the avails of its lottery, its works, accomplished or to be accomplished, as well as the tolls arising from them; and an advertisement inviting subscriptions on those terms, was inserted in the newspapers of the city. The complainants, who are the subscribers to this original loan, consequently lent their money on the terms indicated, but did not, as they might have done, insist upon a formal mortgage. Instead of that, they took a certificate with a marginal memorandum, which bore that certain funds were pledged for its redemption, by the resolution referred to; and this certificate with its memorandum is said to be a mortgage within the purview of the act.

The legal effect of its terms is certainly not that of a mortgage, but, if any thing at all, that of an agreement for a mortgage; and it is treated as such by the complainants in their bill, for they pray specifically for the execution of a formal instrument, which the certificate is, by the nature of the relief sought, confessed not to be. It is doubtless evidence of the terms and conditions of the loan; but it is not the instrument prescribed by the statute for the fulfilment of them. No more is contained in the body of it

than an acknowledgment of the debt; and if any thing makes it a mortgage, it must be the marginal note. But the word mortgage has a technical and distinctive meaning; and the legislature must be supposed to have used it advisedly, as they are supposed to know the legal import of their own language. They doubtless meant an instrument of mortgage, containing apt and proper words; and such as could be enforced by a court of law, for the chancery powers since vested in the judiciary were, at that time, neither given nor contemplated; in a word, such an instrument as would be recognised to be a mortgage both by lawyers and laymen. Grant that it might have been doubted whether the *scire facias* prescribed by the statute of 1705, for a mortgage of land, would lie on a mortgage of the chattel interest directed to be hypothecated by the act of incorporation. But when the legislature gave the power to execute a mortgage, they impliedly gave whatever remedy should be necessary to enforce it, and none so proper as the one used in analogous cases. By force of the power to be implied from this, a court of law might doubtless have issued a writ of sequestration in execution of a judgment on a mortgage of the tolls, such as has since been provided for judgments against corporations by express enactment. But no lawyer would have attempted to support a *scire facias* on the marginal note of one of these certificates, any more than he would have attempted to support it on the equitable mortgage by deposit of title deeds.*

Indeed such a deposit, importing, as it does, a parol agreement for a mortgage of land specifically enforceable notwithstanding the statute of frauds, very closely resembles this marginal note, which, according to its most ex-

* An equitable mortgage by delivery of the title papers to the alleged mortgagee, is no more than a mortgage by parol, and as such cannot be sustained in Pennsylvania. *Shitz* v. *Dieffenbach*, 3 Barr 233; *Bowers* v. *Oyster*, 3 Penn. R. 240.

tended interpretation, imports no more than the existence of a loan on the credit of a security to be executed: and it therefore becomes very material to inquire whether, after the lapse of fifteen years, equity will enforce such an agreement against subsequent lenders, who have been induced to advance their money, for the benefit of the complainants by their supineness.

The case of *Hunt* v. *Rousmaniere* (8 Peters, 1) is to the point. It was held, that if a mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and it is shown to have been produced by ignorance of a material fact,* equity will relieve according to the nature of the case; but that if the agreement was not founded on such mistake, and if it was executed in strict conformity to itself, equity would not decree another security to be given different from that which had been agreed on, or treat the case as if the other security had been actually executed. In the case before us, it is not pretended that there was any mistake of fact either in respect to the agreement or the instrument which the parties treated as an execution of it. The word mortgage is not to be found in the resolution to borrow, or the proposals for subscriptions; nor does it occur on the margin of the certificate. Why then suppose that they contemplated the execution of a mortgage at all? The complainants were at liberty to contract on the basis of a less security than the one authorized by the act of incorporation: and if they thought proper to advance their money with their eyes open to the fact, that the thing pledged for its repayment was incapable of being transferred to their possession, it is too late for them to come here for relief from their misapprehension of its consequences. There is an essential difference between a mortgage and a pawn, as regards the duration of the time of redemption; and as the latter must be attended by a delivery of the thing, there

* Jenks v. Fritz, 7 W. & S. 201.

certainly is a formal one of importance as regards the means of enforcement; consequently, where parties have used an ambiguous phrase to indicate the one or the other of them, the ambiguity cannot be cleared up to the disadvantage of those who have been induced to lend their money on a particular interpretation of the meaning. If the one gave, and the other took, the instrument which was understood by them to be a full execution of the agreement, they took the chance as to its legal effect. A mistake about that, would be a mistake about matter of law, which is not a ground of relief.

Take it, however, that the certificate was not intended to be the consummation of the agreement, but that the parties still looked to the further security of a mortgage: would equity decree it after so great a lapse of time, to the exclusion of subsequent lenders, equally, if not more meritorious? Though an agreement which is to be perfected by the execution of an instrument, is among the few exceptions to the rule, that equity does not decree specific performance of a contract relating exclusively to a personal chattel, it is nevertheless open to all the objections that could, in equal circumstances, be made to the execution of a contract for the purchase of land; and against a bill to enforce such a purchase, a delay of fifteen years would be decisive. But that is not all. The complainants were at liberty to insist on a mortgage, or waive it: but having taken a security which is not a mortgage, I know of no principle which would justify me in executing this agreement to the prejudice of intervening interests. A chancellor never exercises his discretionary power to the detriment of third persons; and hence, in *Orby* v. *Trigg*, (9 Mod. 2, 3) where there was a covenant to let a mortgagee have the estate in case it was to be sold, he was not allowed to claim it to the prejudice of an intervening purchaser without notice, or to the prejudice of the heir, after the lapse of a considerable time, in which he might have done so. The

same principle in *Powell* v. *Hankey*, (2 P. Wm. 82.) The subsequent creditors, in this case, are peculiarly meritorious. Had they not, by reason of the complainants' omission to exact a mortgage, been induced to advance their money on the credit of the fund as an unappropriated one, the company's works would have remained unproductive, and the certificates worthless; so that the subsequent lenders stand in relation to their predecessors very much as their predecessors stood in relation to the company. It was their money which made the property what it is, and prevented the previous investments in the stock, or in the loan from being a total loss. And this they did without notice of previous loans. It is not too much to presume, that the complainants contemplated the necessity of further assistance, and purposely left the pledge an open one, in order to let in subsequent lenders on the same footing. But whatever the design, in the first instance, it is enough that they have put their own interpretation on the contract by accepting an instrument as an execution of it, which is not a mortgage in form or effect; and that they remained ostensibly satisfied with it for fifteen years, while others were lending their money for their benefit, on the credit of the same pledge. Even were the contract indisputably an agreement for a mortgage originally, I would not feel myself at liberty, under the circumstances, to decree it specifically; and what title to relief have the complainants on any other ground?

They claim a right, by force of the certificates, as evidence of a naked pledge, to be declared preferred creditors under the trust in the mortgage to Mr. Roberts. But if they have not the means of enforcing their supposed priority at law, they cannot enforce it in equity, which considers equality to be the nearest practicable approach to pure justice. The principle is most frequently met with in the distribution of equitable assets, but is not peculiar to it. Equity disregards preferences which could not be enforced

at law, wherever it has the exclusive control of the fund; and it respects them only where to do otherwise would merely turn the party round to another tribunal. This is forcibly exemplified in *Child* v. *Stephens*, (1 Vern. 101) a case which has been cited in the course of the argument. The owner of land encumbered with judgments, statutes and mortgages, had subjected it to the payment of his debts. The chancellor directed the real securities to be paid first, and then the bonds and simple contract debts on average. But it being urged that a judgment creditor should have satisfaction before a younger mortgagee, as at law, the chancellor thought it reasonable, yet "left him to get it at law, if he could." (S. C. 1 Eq. Ca. Ab. 141.) The principle does not spring from the essential properties of equitable assets, but is applied to them merely because they are not to be reached without the assistance of a chancellor. How else is this trust fund to be reached? These parties have each a pledge without a legal preference, and the complainants call on me not only to help them to the fund, but to save them first. If they can enforce their pledge at law, well and good: if they cannot, they must be content to come in *pari passu*. Let the bill be dismissed.*

* The specific performance of a contract in equity is not of absolute right in the party asking it, but of sound discretion in the court. *Pennock* v. *Freeman*, 1 Watts, 408. Hence, it requires a much less strength of case on the part of a defendant to resist a bill to perform a contract, than it does on the part of a plaintiff to maintain a bill to enforce a specific performance. *Dalzell* v. *Crawford*, 2 Penn. L. J. 17; S. C. 1 Pars. Eq. Cases, 37; *Farley* v. *Stokes*, Ibid. 429. On a bill to require the specific performance of a written contract, although the subject and import of the contract are clear, so that there is no necessity to resort to evidence for its construction, yet if the defendants can show any circumstances, *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity having satisfactory information on the subject will not interpose. *Ibid.* Where no time is fixed in the contract for its final completion, it ought to be perfected in such time as the court, having regard to all the circumstances existing in a given case, will regard as just and reasonable: a court of equity will not exercise its power for the specific performance of a contract where a party has slept on his rights: diligence is necessary to call the court into action; and where it does not exist, equity will not lend its assistance. *Parrish* v. *Koons*, 1 Pars. Eq. Cases, 79.

Maples *v.* Hicks.

[MARCH 20, 1844.]

A clerical omission on the part of the prothonotary to put his signature to the jurat, after swearing the defendant to his affidavit of defence, does not vitiate the affidavit; the defendant appearing personally in court, and expressing his willingness to be sworn again.

Taking a new note or bill from the same parties, no one being off who was on the old, the securities being of equal effect, is not an extinguishment of the former, and the holder may sue on either when the last becomes due.

But if on the new note or bill the name of one of the endorsers is left off, and the new bill, payable at a future day, is accepted without the knowledge of such endorser, it is giving time to the maker or acceptor, and discharges him whose name is left off.

THIS was an action by the endorsee of a bill of exchange for $553 82, at three months, dated March 8th, 1842, against the drawer. The bill was regularly presented at maturity, and protested for non-payment, and notice given to the drawer and endorser.

On the 13th July, 1843, the defendant filed, in the prothonotary's office, a paper endorsed "affidavit of defence," of which the following is a copy:

The said John Hicks, being duly sworn, saith, that he hath a defence to the whole cause of action filed in this case, of the nature and character following, to wit: 1. That he, the defendant, had no notice given him of the non-payment of the draft sued on, and was by such default discharged from all liability to pay the said draft. 2. That the said plaintiff took from the acceptor of the said draft new notes, extending the time of payment of the debt without the consent of this defendant, to wit, on the 18th of October, 1842, one, at six months, for $158 52, one, at seven months, for $217 78, and one at eight months, for $200, being for principal and interest, &c., of the draft now sued on. (Signed,) JOHN HICKS.

Sworn to and subscribed before me, this 13th day of July, 1843.

[Maples v. Hicks.]

Rule to show cause why judgment should not be entered for plaintiff for want of an affidavit of defence.

Perkins, for plaintiff, contended that this was not an affidavit of defence, because it had not been sworn to; and that no such affidavit could now be put on record, inasmuch as the time for filing it had expired.*

E. K. Price, for defendant, replied that the affidavit had been regularly sworn to before the prothonotary, although that fact did not appear on its face. The defendant was in court, and could be sworn to it again.

The prothonotary here stated to the court, that he had sworn the defendant to the affidavit before filing it, but had inadvertently omitted to put his signature to the jurat.†

SERGEANT, J.—This is merely a clerical omission of an officer of the court, and the defendant being present and willing to be sworn again, the objection is overruled.

This point having been decided, an argument arose as to the sufficiency of the facts set forth in the affidavit, as a defence.

E. K. Price, for defendant.—The principle of law is undisputed, that if after a bill or note has become due, the holder for adequate consideration agrees with the drawee of the bill, or maker of the note, to give him time for payment, without the concurrence of the other parties

* The affidavit may be filed at any time before motion for judgment. A party who does not enforce his right at the first moment, shows he has not suffered by delay, and the signing of judgment is not imposed as a penalty. *Gillespie* v. *Smith*, 1 Harris 65.

† In *Shortle* v. *Stockton*, the supreme court held, that where the affidavit, on an appeal from an award, which was on the same sheet with the recognizance, was subscribed by the appellant, and the recognizance was subscribed by the prothonotary, but the affidavit was not attested by him; that the defect was fatal, and that it could not be cured by parol evidence of the prothonotary that the oath had, in fact, been taken. 7 Watts 526.

entitled to sue such drawee or maker of the bill or note, they will thereby be discharged from all liability, although the holder may have given due notice of the non-payment. And if, without such a consideration, he take a renewed bill, and give time, such bill is a fresh security, and he thereby discharges the drawer and endorsers. And he contended, that according to the decisions in Pennsylvania, the smallest benefit or accommodation was sufficient to create a valid consideration for a promise. The affidavit distinctly states, that the plaintiff extended the time of payment of the debt without the defendant's consent, and that the plaintiff took from the acceptor several new notes for the one on which suit is brought. This, then, was both giving time and taking fresh security, and the defendant is in consequence discharged. This court has already decided these points in *Okie* v. *Spencer*, 2 Whart. 253; and it had been unequivocally decided before in England, in the case of *Gould* v. *Robson*, 8 East 576.

Perkins, contra:—A careful examination of the law upon this subject, will show the principle to be this: that where new negotiable paper is taken as collateral security, at the maturity of a promissory note or bill of exchange, without the consent of the endorser or drawer, they will be thereby discharged. But where the note or bill has been protested, and the parties continue in default, the accepting of such new paper does not release the drawer or endorser, although done without their knowledge or consent. In every case cited by the other side, the fresh security was taken at the time the original paper matured, and not afterwards. In the present case, the new notes were not given until four months after the maturity of the bill on which the suit is brought.

Here, then, the acceptor was in default, and the bill protested. Four months elapsed, and neither the acceptor nor defendant paid or offered to pay the bill. They were

both liable. It was therefore to the interest of the defendant, that the plaintiff should endeavour to obtain payment from the acceptor; and having done so, the defendant ought not to be allowed to say that he was thereby discharged.

The notes which were given, were not of a higher character than the bill in suit, and contained the name of no new party on them. They cannot, therefore, be considered a fresh security.

SERGEANT, J.—I apprehend they included the principal and interest due at the time they were given, as well as the charge for the protest.

Perkins:—Admitting that to have been the case, still they do not form a new security. They simply promised in effect what the bill itself promised. *Okie* v. *Spencer*, (2 Whart. 257–8.) Besides, the affidavit does not state that the defendant was an accommodation drawer, which would make him merely a surety. If the defendant was the original debtor, he is certainly not discharged; and if he was not, he was bound to say so in his affidavit.

Okie v. *Spencer*, cited for defendant, is to be distinguished from the present case in several respects. There, the negotiation was made on the day the promissory note became due—the endorser was an accommodation party, and the check that was given for the note was drawn by new and different persons. In this case, the notes received for the bill contain no new party; they were not given until four months after the maturity of the bill, and the defendant does not aver that he was an accommodation drawer. The opinion of Kennedy, J., was cited in favour of these distinctions, from 2 Whart. 257–8.

The court held the matter under advisement until Saturday, 16th September, 1843, when

SERGEANT, J.—Discharged the rule.

[Maples v. Hicks.]

On the trial of the cause, on the 20th March, 1844, it was shown, on the part of the defendant, that some four months after the bill sued upon was due and protested, the plaintiff received from the acceptor of the bill, without the consent of the defendant, three promissory notes, for the amount of the bill, interest and protest, at six, seven and eight months, and gave a receipt for the same, saying, that when the notes were paid, he was to return to him the bill in question.

The jury were charged as follows, by

Huston, J.—If a new note or bill is given by the same parties, no one being off who was on the old—the securities being of equal effect, the latter may not be an extinguishment of the former, and the holder may sue on either when the last has become due:—but if on the latter note or bill the name of the endorser is left off, and the new bill, payable at a future day, is accepted, without the knowledge, and, especially, if against the consent, of some third person, as endorser, it is giving time to the maker or acceptor, and discharges him whose name is left off, and against whose wish, or without whose knowledge the new security, payable at a future time, was taken; and the fact of interest being put in the last notes, and made principal, makes the case stronger.

The defendant, by giving written notice to sue at once, might possibly have been in a better situation, or he might, if this arrangement had not been made, have taken up the draft and sued immediately. The putting in the interest was a consideration. The new notes then prevented suit against the acceptor. This was done against the will of the drawer, and it is in effect giving time.

Verdict for the defendant.*

* Where the holder of a note has, without the consent of the endorser, by entering into a binding engagement with the maker, to give time, disabled himself from proceeding against him, the endorser is discharged, whether

Flanagin *v.* Leibert.

[November 15, 1843.]

Notes of testimony taken by counsel on a former trial, were allowed to be read in evidence, where it was proved that the witness resided in another state, and was not at the time of the trial within the jurisdiction of the court.

On the trial of this cause, plaintiffs called a witness, who did not appear. Proof was then given that he resided at Mount Holly, in the state of New Jersey, and had not been seen in Philadelphia at any recent time.

Perkins, for plaintiff, then offered to read his notes of the witness' testimony taken on a former trial of the case

the disability was incurred before or after judgment in a suit upon the note. *Manufacturers' Bank* v. *Bank of Pennsylvania*, 7 W. & S. 335. A judgment against the maker and endorser of a note, does not make them equally *principal* debtors. *Beebee* v. *West Branch Bank*, 7 W. & S. 375. But if the endorser consents to the giving of time, or for a sufficient consideration agrees with the maker to become the principal debtor, he will not be released. *Cowden's Estate*, 1 Barr 267.

Where an instrument was executed by the endorser of a promissory note, which had been protested for non-payment, reciting that the drawer was about making an arrangement with the holder for the renewal of the note, "*which is to be reduced from five to ten per cent. every sixty days*," and agreeing that the protested note should be held as collateral security, and stipulating to take no advantage of any delay given; which agreement was received by the holder, who gave several extensions without always exacting the stipulated reduction. *Held*, 1. That the agreement was founded on a sufficient consideration. 2. That the holder having accepted some renewals without exacting the reduction, had given time to the drawer, without the consent of the endorser, and could not recover on the original endorsement. *Dundas* v. *Sterling*, 4 Barr 73.

A levy on the goods of the drawer, and a release by order of the owner of the judgment, is a discharge of the endorser *pro tanto;* and the plaintiff cannot object that it is a nullity, because made by the sheriff without seeing the goods. *Bank* v. *Fordyce*, 9 Barr 276. And see generally 2 Am. Leading Cases, 339.

before Sergeant, J., and stated that he believed them to be full and correct.

This was objected to by the counsel for the defendant, because the notes were very probably not free from inaccuracies. 4 S. & R. 205; 11 S. & R. 337.

KENNEDY, J.—Admitted the notes to be read in evidence, remarking that it was not to be expected that the notes of testimony taken by counsel, should contain every word which witnesses might make use of. If they contained substantially what was said, that was sufficient. In this case the witness could not be compelled to attend, and counsel might read his notes, subject to correction by the other side.*

* It is a rule of law, that what a deceased witness swore at a former trial, may be given in evidence at a subsequent trial of the same point between the same parties. *Lightner* v. *Wike*, 4 S. & R. 205; *Moore* v. *Pearson*, 6 W. & S. 51. And so, where the witness is out of the state. *Magill* v. *Kaufman*, 4 S. & R. 319; *Cox* v. *Norton*, 1 Penn. R. 412. And this may be done by one of the counsel then concerned for the same party, though he does not recollect the testimony independently of his notes, nor whether there was a cross examination, and can give only the substance of the former testimony. *Chess* v. *Chess*, 17 S. & R. 408; *Gould* v. *Crawford*, 2 Barr 89; *Cornell* v. *Green*, 10 S. & R. 14; 1 Greenl. Ev. § 163—166.

Combs *v.* The Bank of Kentucky.

[NOVEMBER 18, 1843.]

The act of assembly which provides for the service of process upon the president or other officers of corporations, is only applicable to corporations whose charters are granted in Pennsylvania; and service upon an officer of a corporation of another state, whilst within the jurisdiction of our courts, is irregular, and will be set aside.

THIS was an action commenced by summons, which was served upon Virgil M'Knight, president of the bank of Kentucky, at the United States hotel, Chestnut street, Philadelphia, and so returned by the sheriff.

Rule to show cause why the service of the writ should not be set aside.

F. W. Hubbell and *B. Gerhard*, for defendant.
J. Randall and *O. F. Johnson*, for plaintiff.

KENNEDY, J., after argument, said that the act contemplated our own corporations, and did not extend to those of another state, and accordingly the rule was made absolute, and the service set aside.*

* By act of 21st March, 1849, (*Pamph. p.* 216,) process against any foreign corporation may be served upon any officer, agent, or engineer of such corporation, either personally, or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation. Under this act the following return to a summons was held sufficient by the district court for the city and county of Philadelphia—"Served by leaving a true and attested copy of the within writ, with an agent of the defendant, Dec. 22, 1849, and leaving a certified copy in the office attached to the depot, January 7, 1850." *Kennard* v. *The Railroad*, 7 Leg. Int. 39.

Conway to use *v.* Fire Insurance Co.

[FEBRUARY 24, 1844.]

The person to whose use an action is brought, is competent to make the affidavit necessary on an appeal from an award of arbitrators.

THIS was a motion to strike off an appeal from an award of arbitrators. The affidavit was taken and recognizance entered into by Carter, the *cestui que use*.

T. I. Wharton, for the rule, argued that the act of assembly required the party, his agent or attorney, to make the affidavit, and that it was not competent for Carter to do so.

Rawle, contra.

KENNEDY, J., decided that the *cestui que use* was competent to make the affidavit, and the rule was discharged.*

* The oath on an appeal from award may be administered by the deputy of the prothonotary, in virtue of a general parol delegation. *Reigart* v. *M'Grath*, 16 S. & R. 65. And where the record shows that the writ was signed by a clerk of the prothonotary, the court is bound to take notice that he was the deputy, and had authority to administer the oath on appeal from an award. *Drumheller* v. *Mumaw*, 9 Barr 19. A person sued in representative character, as an administrator, is not exempted from making the usual affidavit on an appeal from an award. *M'Connel* v. *Morton*, 1 Jones 398.

Serrill et al. *v.* Denman et al.

[JUNE 3, 1844.]

In an action against a firm, where one of the partners dies pending the suit, his executors cannot be made parties under the 27th section of the act of 24th February, 1834, but the action must proceed against the survivor and his representatives.

THIS was a *scire facias* under the 27th section of the act of February 24, 1834, to make the executors of Worley parties to the suit which had been originally brought against Worley, Welsh & Connell, copartners, &c., and had been returned "*nihil habet*" as to Connell.

The defendants in their second plea alleged, "that Worley died in the lifetime of Welsh, against whom the action survived: that Welsh died in the lifetime of Connell, who is now living, and that the cause of action survived against him," &c. To this plea there was a demurrer.

M'Call and *D. P. Brown*, for plaintiffs.
Dunlap and *Randall*, for defendants.

The opinion of the court was delivered by

SERGEANT, J.—This suit was originally brought against Connell, Worley & Welsh, to recover a partnership debt. As to Connell the return was, "not summoned;" and after declaration in the usual way, the suit proceeded against Worley and Welsh alone. The deaths of these two defendants have occurred since the suit was pending, and before judgment. Connell has never made himself a party to this day. One question raised by the defendants is, whether the plaintiff is not turned round to a suit against Connell alone, as sole surviving partner on the general principle of law.

I am inclined to think on this second plea, which is all that is before me now, that this question must be resolved altogether by the circumstance of Connell's being returned

"not summoned," a proceeding in our practice equivalent to outlawry in England. If this proceeding excludes Connell from being any longer a party, and renders it virtually and in legal contemplation a suit only against Worley & Welsh, then the same doctrine will apply as if the suit was only against Worley & Welsh; and it would be between them altogether that the question of proper parties would arise. I do not feel myself authorized to decide that question in this case; because I do not wish to interfere with either party in the course which they may be advised to take. It is a question of some magnitude and novelty, and would perhaps require more consideration than I can now bestow. But I am clearly of opinion, as between Worley and Welsh, supposing this point settled, that the suit may proceed; this plea in bar is good as far as respects the executors of Worley who have put in this plea. Now it is in vain to attempt a distinction between continuing a suit pending, and commencing a new suit, because a suit to be continued must be continued correctly; and it is evidently for that purpose that the act of assembly requires a judgment of the court. There is nothing new in that act; it is in accordance with the statute of Wm. and the practice in England. The English authorities are directly applicable, and we have the law explicitly laid down, that a suit for a partnership debt must be brought against the surviving partner, and you cannot join the representatives of a deceased partner in a suit against a surviving partner or his representatives.*

* The act of 11th April, 1848, (*Dunl.* 1124,) provides that "where a judgment shall hereafter be obtained against two or more copartners, or joint or several obligors, promissors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone. And in any suit or suits which may hereafter be brought against the executors or administrators of a deceased copartner, for the debt of the firm, it shall not be necessary to aver on the record, or prove on the trial, that the surviving partner or partners is or are insolvent, to enable the plaintiff to recover."

Bank *v.* Perdriaux et al.

[August 17, 1844.]

The service of a summons will be set aside, if it appear that the copy served was not "attested" by the officer.

This was a rule to show cause why the service of the summons should not be set aside.

The following is the return of the sheriff, which it was moved to set aside.

"Served each of the within named defendants by giving them a true and attested copy of the within writ, and making known to them the contents thereof."

"August 9th, 1844. The above return is amended upon leave granted by the court, by striking out the words 'and attested.'"

W. A. Porter, for the rule.—This writ was improperly served. There are four modes of serving a summons. *Purdon's Digest*, p. 45. The legislature intended no others should be adopted. The third mode directs that the defendant shall be served "by giving him notice of its contents, and by giving him a true and attested copy thereof." In 1 *Sugden on Powers*, pp. 304–331, the meaning and application of the word *attested* are discussed at length. It is best rendered by our Saxon word *witnessed*. The defendant shall receive a copy of the original writ, witnessed by one or more persons. This is the only means of determining whether or not it be a true copy. There is no better reason why the act of assembly should be departed from in serving a summons, than in executing a will or assigning a bond. In the service of writs there is no safety either to plaintiff or defendant, but in following the directions of the act. The practice hitherto has been uniform.

H. M. Phillips, contra.—The act of assembly directs only that an exact copy of the summons shall be served. The officer must satisfy himself of the fact. Neither he nor any one else is commanded to write his name on the writ. This objection to the service has come too late. It ought to have been made at the earliest moment. The court has been in session several times since the return of the sheriff was made. An appearance *de bene esse* was also entered for the defendants. It would be extending the use of this mode of appearance too far, to sustain this objection now. An affidavit of defence has also been filed by one of the defendants. They must either be in court or out of it. They must make their election. That has been done by filing the affidavit. This is a technical objection that ought not to be favoured.

SERGEANT, J.—I do not see how the court can refuse to set aside the service of this writ. The act commands that a true and attested copy shall be served. This language is too plain to be misunderstood. The sheriff has not conformed to the directions of the act. The evils of a loose practice in the service of writs are innumerable, and should be guarded against. This motion seems to have been made as early as practicable. If the appearance had not been entered, the defendants might have encountered other difficulties. An affidavit of defence was filed by only one defendant. The others cannot be prejudiced by this act. Rule absolute.*

* The practice in this state is, on motion to the court, at the instance of the defendant, to set aside a sheriff's return, when the writ is defectively served. The defendant may enter an appearance *de bene esse*, and ask the judgment of the court as to the legality of the service. But this does not extend further than to set aside the sheriff's return. The writ remains good, and the plaintiff may either discontinue his suit, at his election, rule the sheriff to make a good return, and issue an *alias*, or sue the sheriff for a false or insufficient return. *Winrow* v. *Raymond*, 4 Barr 501. A summons cannot be served by leaving a copy at the counting-house of the defendant. *Ibid.*

Commonwealth *v.* Van Sickle.

[May, 1845.]

A pig sty in a city is, *per se*, a nuisance.

It is no defence to an indictment for a nuisance in a city, that it has been conducted in the same place for a long series of years, as no nuisance can be justified by prescription; nor that it has become necessary to the community in which it is situated.

A nuisance in a city is not the less obnoxious to indictment from the fact that it is connected with a large and flourishing manufacture.

Where an indictment charged that the defendant fed a large number of hogs, with "slop, fermented grain, the offals and entrails of beasts, and other filth," by means whereof a nuisance, &c., was created, and the evidence showed that the hogs were fed exclusively on slop, it was held that there was no variance.

The act of assembly of 21st March, 1806, prescribing "that in all cases where a remedy is provided, or any thing directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or any thing done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect,"—does not destroy the remedy of indictment at common law, as to a nuisance in the city of Philadelphia, though such nuisance is in itself liable to be suppressed by the summary process afforded by the acts of assembly constituting the board of health.

This was an indictment for nuisance found in the court of Oyer and Terminer, &c., of the city and county of Philadelphia, at March term, 1845, and removed by certiorari to the supreme court. The indictment was in three counts, and was substantially as follows.

The first count charged that the defendant, near to divers public highways, &c., and also to the dwelling houses of divers citizens, &c., did unlawfully, and without sufficient cause, place in a certain messuage and tenement, &c., a great number of hogs, to wit, one thousand, and the said hogs then and there, &c., did feed and cause to be fed with the offals and entrails of beasts, and other filth, by means whereof divers noisome and unwholesome smells

and stenches, &c., were generated, &c., whereby the air was made insalubrious and offensive, &c., to the common nuisance, &c. The second count was for the mere keeping of the hogs, with the averment that they were fed with "slop, fermented grain, the offals and entrails of beasts, and other filth," &c.; but was in other respects similar to the first. The third count alleged the existence of a "certain house, commonly called the Pigs' Boarding House, and a certain yard to the same belonging," and proceeded to charge the defendant, in about the same phraseology as the first count, with keeping and feeding therein hogs in great numbers.

The evidence was voluminous, occupying more than a week in its rendition.

It appeared that the alleged nuisance consisted of a large establishment in the north-west corner of the city of Philadelphia, fronting on the river Schuylkill, and consisting in part of a large distillery, and in part of a frame edifice of considerable extent, with extensive outworks attached thereto, in which large numbers of hogs were fattened for the city market, and were fed chiefly from the refuse from the distillery. The site was within the original limits of the city charter; and it appeared in evidence that it had been used for the purpose above mentioned, for more than thirty years. At the time of the trial, and for a few years previous, the city had been rapidly extending in that direction, but at the time of the establishment of the alleged nuisance, the land in its vicinity had been for a number of years an unoccupied waste, which, in several instances, at different points, had been devoted to similar purposes. Several public institutions of great importance however had, from time to time, been erected in the immediate neighbourhood; and it was the alleged injury inflicted on these, as well as on the dwelling houses lately erected in the vicinity, that formed the principal ground of complaint.

It was shown by the prosecution, that the buildings in

question were capable of accommodating as many as a thousand hogs, and that frequently as many as that number were there collected at one time; that in warm weather the stench was so intolerable, as to make it almost impossible to pass through the street on which the establishment opened, without nausea; and that when the wind was from the north-west, it was perceptible for a half mile towards the heart of the city; that the water of the Schuylkill was infected by the great quantities of filth and ordure which were discharged; that the value of property adjacent was diminished from ten to fifteen per cent., and that the comfort of the residents thereabout was materially affected by the effluvia.

On the part of the defence it was insisted, in the first place, that by the acts establishing the board of health, cognizance of nuisances of this character in the city and county of Philadelphia, was vested in that institution; and that this being the case, jurisdiction at common law was ousted by the operation of the act of 21st March, 1806.

It was shown also, that the establishment was conducted with as much regard to cleanliness as its character permitted; that there were and had been from time immemorial a number of smaller piggeries, to which the smell could be jointly attributed; and that it had been in existence long before the erection in the neighbourhood of the edifices, the value of which, it was alleged, were deteriorated.

In addition to this last branch of defence, it was urged, as a matter of law, that the business, as thus conducted, was essential to the city, and that the section of the city plot on which it was carried on, had been for so long a period devoted to this and similar purposes, as to give those who had more recently moved into it no just right of complaint. There was a variance also, it was insisted, between the indictment and the proof, the former of which averred the hogs to have been fed with the offals and entrails of beasts, and other filth, whereas the latter showed,

that the food was principally grain and slop. Several technical grounds of defence to the allegation of ownership in the indictment were also taken; but as they were negatived by the jury, and presented no question of law to the court, they are here omitted.

Cuyler, *F. Wharton*, and *Kane*, Attorney General, who addressed the jury for the commonwealth, argued that a pig-yard in a city is, *per se*, a nuisance, Bac. Abr. title Nuisance; *Queen* v. *Wigg*, 2 Salk. 460; 4 Rogers' Cr. Recorder, 26; and that if it be such, it cannot be protected from indictment, by its comparative usefulness, *R.* v. *Ward*, 4 Ad. & El. 384; by the existence of kindred offences around it, *R.* v. *Neil*, 2 C. & P. 485; or by its long continuance, *Elkins* v. *State*, 2 Humphrey, 543; *Com.* v. *Alburger*, 1 Whart. 469; *Com.* v. *Tucker*, 2 Pick. 44. The alleged variance as to the feed of the hogs, they urged, was immaterial, *People* v. *Townsend*, 3 Hill 479.

Hood, *Goodman*, *C. Gilpin*, and *F. W. Hubbell*, insisted: —That the business of the defendant was sanctioned by the long toleration of other more offensive trades in the neighbourhood, and that this was a defence in law. *R.* v. *Watts*, Moo. & M. 281. That it having been in existence before the population had reached that section of the city, those subsequently moving into the neighbourhood, had no just ground for complaint. *R.* v. *Neville*, Peake, N. P. 91; *R.* v. *Russell*, 6 B. & C. 566; *R.* v. *Cross*, 2 C. & P. 483. The necessity of an establishment like this, withdraws it from the operation of the law concerning nuisance. 1 Hawk. P. C. c. 75, s. 10. There is a clear variance between the indictment and the evidence, with respect to the alleged noxious food. 2 Russ. on Crimes, 793.

Sergeant, J.—The establishment, which is the subject of this indictment, is alleged by the commonwealth to be

injurious to comfort and health. The defendant denies the truth of both these allegations. I need not press upon you at the outset the great importance of the issue to the city of Philadelphia, no part of which, either by the terms of its charter, or the necessities of its citizens, can be dedicated to the purposes of a nuisance. No man, or body of men has a right to occupy a portion of it, and declare that that shall be a Golgotha. Persons owning property in city lots are entitled by right to healthy air, and to a use of the public highways unimpaired by any adjacent nuisance. If this is a principle of general application to all cities, it is of peculiar moment to this, where the climate, during the summer months, is one of intense heat, and where, from the comparative lowness of the ground, corruption of the atmosphere may produce, as, in former times, it has produced, contagion and disease. It was for the purpose of checking such mischiefs, that the board of health was originally organized, and had that body done its duty in the present case, this trial would never have taken place.

The issue in this case narrows itself to a single point, and that point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. Before reaching it, I will dispose of one or two grounds of defence which have been zealously urged as a bar to the indictment. In the first place, it is said that the defendant has acquired by lapse of time, and by original undisturbed possession of the precinct, a right to maintain the establishment in question against subsequent incomers. Such I deny to be the law. No one has a right to erect a nuisance, and then, after time has passed by, to say that he has a title to it by prescription. You will not understand me as saying that the distillery, stripped of the piggery attached to it, is in itself a nuisance. If, however, the whole concern, as jointly conducted, is such, no length of time can protect it.

Nor is the position, that the business conducted by the

defendant is necessary to the city, and should therefore be managed in convenient proximity to it, entitled to your consideration. There are some trades so necessarily offensive, that merely carrying them on within the limits of a populous city, is in itself a nuisance. The one which is the subject of this indictment, you will understand to be such. The law is perfectly well settled that a hog pen in a city is a nuisance; in the country, it is not so, though if a man should start a pig-sty opposite to his neighbour's door, the latter has a remedy; and in a city, which is one close neighbourhood, *a fortiori*, there must be a remedy also. You will take the law to be, that the keeping of pigs in a community like this, whether there be one or a thousand, is indictable. Nor does the law recognise any distinction between the several points of a city dedicated to public use and comfort. A pig-sty is as justifiable in the centre of a city as in its farthest corner. If the one that is before you is sanctioned, a man will have a perfect right to open another opposite this court house. You are not justified in singling out any section of a city for a purpose like this; if you do, you must open the whole of it to the same object.

It is said, by way of defence, that manufactures in a large community are to be protected, and that this was a manufacture. Without touching the question, whether a manufacture, in the strict sense of the term, if offensive to the comfort of the community, can be removed by indictment, there is no pretence for saying, that a piggery is a manufactory at all.

The alleged variance between the indictment and the evidence, as to the feed of the hogs is immaterial, and in fact, you may treat the entire averment as to feed, as surplusage.

It is not necessary, as seems to have been supposed by the defence, for the commonwealth to have proved, that the material on which the hogs were fed, was in itself unwholesome and offensive. If the hogs lived, they must

have eaten, if they ate, they must have digested, if they digested, there must have been excrementation, and if so, there is no necessity for any dispute as to whether there was sufficient cause for complaint in the establishment conducted by the defendant.

Without considering, therefore, whether the discomfort and ill health experienced by the neighbourhood is to be attributed to this alone, or to this in conjunction with other causes, it is my duty to instruct you, that the fact of the nuisance being cognizable by the board of health, does not exclude the common law procedure by indictment, and that if you believe the evidence in the whole case, you must find the defendant guilty, in manner and form, as charged in the indictment.

A verdict of guilty being rendered by the jury, motions in arrest of judgment, and for a new trial, were made by the defence, embracing the principal points urged on the trial, but were ultimately abandoned, and the nuisance abated, without the case being taken to the court in banc.*

* In the case of the *Commonwealth* v. *Hutz*, tried in the court of quarter sessions of Philadelphia county, on the 13th November, 1849, before Judge Parsons, the doctrine of the foregoing case was applied to the rural districts of Philadelphia county. In that case the court charged the jury that "no man has a right so to occupy his property as to incommode or annoy his neighbour—nuisances can as well arise in the centre of a rural district as in a thickly settled town—the principle is the same every where; and if persons will locate their piggeries near a public road, they must take the necessary care to keep them in such a cleanly state as not to annoy the passengers along the road."

Inslee *v.* Jones.

[SEPTEMBER 9, 1845.]

The business of a real estate broker is to find a purchaser, not to make the bargain: his duty is complete when he introduces the purchaser to his employer.

The custom to pay real estate brokers one per cent. on the amount of their sales, as a compensation for their services, where it is certain, uniform, and generally understood, is binding on persons employing them.

THIS was an action of *assumpsit* to recover the amount of commissions or brokerage, alleged to be due to the plaintiff for negotiating the sale of certain real estate for the defendant.

It appeared, by the testimony, that, on the 12th of September, 1839, the defendant employed the plaintiff to sell a farm of 640 acres, with a mansion-house and appurtenances, situated about ten miles from the city of Philadelphia. The plaintiff registered the property in his books, with a description of its qualities, locality and price, ($100,000) in the usual manner. The property was subsequently (in 1844) sold for $75,000, and the plaintiff thereupon claimed a commission of one per cent. for effecting the sale.

The defendant insisted that the sale had not been effected by the plaintiff, but by Emlen & Fisher, who were also real estate brokers. It was proved that the property was registered in the office of Emlen & Fisher, who had advertised it for sale, and now claimed the brokers' commission. The purchaser first obtained a knowledge of the property being for sale through these advertisements; but an interview between the defendant and the purchaser, which finally resulted in a sale of the premises, was effected by the plaintiff, and took place at his office.

It was also in proof that when the plaintiff presented his

claim, the defendant said it was too much, and subsequently offered to pay $200. A number of conveyancers and real estate brokers were examined, who proved that it was the universal custom to charge a commission of one per cent. on all sales of real estate, where the sale is effected by them, or through their registry or advertisement.

Brightly and *Clarkson*, for plaintiff.
H. M. Phillips and *M'Ilvaine*, for defendant.

SERGEANT, J.—In his charge to the jury, said that the question involved in this case was, in some measure, a novel one; real estate brokers being a professional class of recent origin. Conveyancers formerly attended to the purchase and sale of real estate, with their other business, and kept such a register of property as has been produced in this case. Brokers have, for several years, taken this business in hand; and the question of their compensation involves some nicety, as it depends upon a usage said to exist among them and those with whom they deal. It is contended that the plaintiff, who belongs to this profession, is not a mere agent, to be paid according to the value of his services; nor is he to be regarded, it is argued, in the light of an executor, guardian or trustee, who are paid in proportion to the trust reposed in them, and the labour, risk and importance of their employments. Here there is, it is said, a custom; and if the jury are satisfied that this custom really exists, that it is uniform, universal and generally understood, it will form the law of this case, and take the question out of the general rule. If the jury are satisfied that this custom of paying the broker who sells real estate for another, one per cent. as a compensation for effecting or bringing about the sale, they must also say how far this custom applies to the present case. The jury are to decide (where there are several brokers employed, as in this case,) who is to be paid the one per cent. on the

sale; whether each is to receive this compensation, or whether it is to be divided between them, according to their respective merits and services. The witnesses have not explained what the custom is on this subject, and you must determine this branch of the question upon the best light you have. It appears by the testimony, that the broker who is entitled to the one per cent. is he who is employed to effect the sale, and who actually does effect the sale, or brings the sale about. He is employed to find a purchaser, not to make the bargain; and his duty appears to be complete if he introduces the purchaser to his employer. The principal, in such cases as this, always reserves the right to make the contract, while the agent merely brings him a customer or purchaser. These agencies are extremely useful to society, and in all commercial countries are very numerous: a man could perhaps attend to his own lawsuits, but it is more to his interest to employ an attorney for that purpose, and attend to his cornfield or his workshop.

The learned judge concluded by observing, that if the plaintiff was the broker by whom the purchaser of the defendant's property was introduced to the defendant, the jury were to say whether he was the only broker acting in the matter, and whether he was entitled to the whole, or only a part of the one per cent. commission.

The jury found a verdict for the plaintiff for $406,66.*

* A usage which is to govern a question of right, should be so certain, uniform and notorious, as probably to be known to, and understood by, the parties, as entering into their contract. It cannot be proved by single, isolated instances. *Cope* v. *Dodd*, 1 Harris 37. The ancient, established, uniform and known custom of persons engaged in any trade, makes a law for that trade: it is their way of doing business. It is the rule to which all who enter that trade are understood to consent. It makes, supplies and construes their contracts. *Wilcocks* v. *Phillips' Executors*, Wall. Jr. 64.

Montelius *v.* Montelius.

[October 11, 1845.]

Judgment was entered on a bond and warrant of attorney, which stipulated that execution should not issue before default in the payment of several promissory notes, *unless* the partnership existing between defendant and A. B. should be dissolved: *held*, that an execution issued before the maturity of the notes, without a *scire facias* having been first sued out, to ascertain whether the partnership had been dissolved, was irregular, and it was accordingly set aside.

It is no objection to the validity of a judgment entered under the 28th section of act of 24th February, 1806, that no declaration was filed; although the warrant of attorney required that one shall be filed.

A warrant of attorney to enter judgment as of the last, next, or any subsequent term, authorizes the entry of a judgment in the present term.

As between the plaintiff and defendant, it is no objection to the validity of a judgment, that the prothonotary has not fully complied with the act of 24th of February, 1806, which requires him to enter on his docket the date and tenor of the instrument of writing on which the judgment is founded.

This case arose on a rule to show cause why a judgment entered on a bond and warrant of attorney, and the execution issued thereon, should not be set aside. The decision requires that the bond and warrant should be given at length, as follows:

"Know all men by these presents, that I, Marcus Montelius, tobacconist, of the city of Philadelphia, am held and firmly bound unto William Montelius, the elder, merchant, of the said city, in the sum of $6000, of good and lawful money of the United States, to be paid to the said William Montelius, Sen., or his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made and done, I do bind myself, my heirs, executors, administrators and assigns, and every of them, firmly by these presents. Sealed with my seal, dated the 6th day of December, A. D. 1844.

"The condition of the above obligation is such, that

whereas the above bounden Marcus Montelius hath this day given to the said William Montelius, Sen., his promissory notes, for the payment in all of $3000, as follows, to wit: one for $500, dated December 6, 1844, payable 18 months after date; one note for $500, dated as above, payable two years after date; one note for $500, dated as above, payable two years and six months after date; one note for $500, dated as above, payable three years after date; one note for $500, dated as above, payable three years and six months after date; and one note for $500, dated as above, and payable four years after date.

"Now, if the above named Marcus Montelius, his heirs, executors, administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above named William Montelius, Sen., his heirs, executors, administrators or assigns, the just and full sum of $3000, at the times and in the amounts above set forth, with legal interest for the same, without fraud or further delay, then this obligation to be void and of none effect, or else to be and remain in full force and virtue.

"And further, I, the said Marcus Montelius, do hereby empower any attorney of any of the courts of record of this state or elsewhere, to appear for me, and after one or more declarations filed for the above penalty, thereupon to confess judgment or judgments against me as of the last, next, or any subsequent term, with release of errors; under the condition and with the distinct understanding, however, that no execution shall issue, and no proceedings whatever be had upon said judgment or judgments, saving and excepting one or any of the following named events or occurrences should take place: first, that any one of the said notes shall have become due and remain unpaid; secondly, that the partnership now existing between the said Marcus and William Montelius, Jun., shall have been dissolved; thirdly, that any judgment for any amount ex-

ceeding $200, shall have been entered upon the records of any court of this commonwealth against me, the said Marcus; and, fourthly, upon my decease. In case any one of the above-mentioned contingencies or events shall have taken place, then the said judgment or judgments to take effect, otherwise, no proceedings to be had thereon.

"In witness whereof, I have hereunto set my hand and seal, this 6th December, 1844.

MARCUS MONTELIUS, [Seal.]

Witnesses.—Robert T. Conrad, William Montelius, Jr."

On the 13th December, 1844, judgment was entered upon the foregoing bond, but without any appearance being marked for either party, or declaration filed.

The prothonotary entered upon his docket the names of the parties, the date of the bond, its penal sum, and the dates and amounts of the several promissory notes, but not the terms of the stay of execution.

On the 3d of October, 1845, the plaintiff issued a *fi. fa.* under which the sheriff levied upon and took possession of the stock in trade belonging to the defendant, at his store, No. 356 Market street.

On the 6th of October, 1845, a rule was obtained to show cause why the judgment and execution should not be set aside, returnable October 11, 1845.

Before the return of the rule the plaintiff took depositions to prove that the partnership between Marcus Montelius and William Montelius, Jr., had been dissolved by consent, before the execution was issued.

Webster, for defendant, argued, that the judgment had not been entered in accordance with the terms of the warrant, in the following particulars: first, no declaration was filed; it was expressly required that one should be filed before entering judgment, and as a warrant of attorney is in the nature of a contract, its terms are to be strictly fol-

lowed. Secondly, no authority was given by the warrant to enter the judgment at the December term. It read, "to confess judgment against me as of the last, next, or any subsequent term," thereby excluding authority to enter judgment at the then present term. A warrant to appear and confess judgment of a particular term must be entered of that term, and cannot be entered of any other. Bing. on Judgments 44; 2 Ch. Arch. Pr. 679. Thirdly, the prothonotary, in entering the judgment, had not complied with the act of 24th February, 1806, (Purd. Dig. 256,) which requires him "particularly to enter on his docket the date and tenor of the instrument of writing on which the judgment is founded." The prothonotary had not entered on his docket the special agreement for the stay of execution, which was an essential part of the warrant, and of great consequence to the defendant: certainly a part of the tenor of the instrument. *Helvete* v. *Rapp*, 7 S. & R. 306.

As to the execution, it was a conclusive objection to it, that it had been issued without a *scire facias* having been first sued out, or any suggestion put upon the record of the happening of any of the contingencies named in the warrant, or without leave of the court. The docket showed that none of the notes had matured; and it did not show the happening of any event which would entitle the plaintiff to execution. It must first appear that the defendant has made default, which could not be properly done except by a *scire facias*. The cases showed such a step to be necessary. *Holden* v. *Bull*, 1 Penn. Rep. 460; *Adams* v. *Bush*, 5 Watts 289. It was true, the plaintiff had taken depositions to prove the dissolution of the partnership, but it was sufficient for the defendant to deny that fact, and to ask the court to direct an issue to be formed to decide the question, or else require the plaintiff to sue out a *scire facias*.

Williams and *Lex*, for plaintiff, argued that the entry by

the prothonotary of judgment, without filing a *narr.* was good, although the warrant only authorized such an entry after declaration filed;—they relied on the 28th section of act of February 24, 1806; *Helvete* v. *Rapp*, 7 S. & R. 306; *Com.* v. *Conard*, 1 R. 249;—that an execution might be issued without a *sci. fa.* or notice to defendant, and without first obtaining leave of the court—and that upon the happening of either of the events specified in the condition of the bond, the whole of the amount intended to be secured, became due. *Gorman* v. *Richardson*, 6 S. & R. 163; *Smith* v. *James*, 1 Miles 162; *Monell* v. *Smith*, 5 Cowen 441.

Brooke, in reply, adverted to the fact that this rule was obtained at the instance of the defendant, and not upon the application of a creditor, as appeared to be the case in several of the authorities cited on the other side. He remarked, that judgments were frequently sustained between creditors, which would be held to be void in a contest between the parties. In *Helvete* v. *Rapp*, the defence was taken by a judgment creditor. The terms of the warrant are omitted in the report, but it is not alleged in any part of the case, that the docket entry did not set forth particularly the "date and tenor" of the bond. The question presented was, whether, notwithstanding all the particulars were spread upon the docket, the omission of the prothonotary to state, in words, that judgment was entered, rendered the entry nugatory. This case does not bear any analogy to the present. The *Commonwealth* v. *Conard*, was an action against the prothonotary for an alleged breach of duty in omitting to enter on his docket the stay of execution provided for in the warrant of attorney, and the question was whether, under the circumstances, in the absence of particular instructions, the prothonotary acted in bad faith. Neither of these authorities touch the positions taken by the defendant. The cases cited in support of these positions, clearly show that the entry of this judg-

ment is not in accordance with the warrant, nor in pursuance of the act of assembly; and it is therefore void.

But even if the judgment was regularly entered, the execution cannot stand. It is alleged that one of the contingencies mentioned in the warrant has arisen, to wit, the dissolution of the partnership. What constitutes a dissolution may be a question, and upon that point the defendant has a right to be heard before a tribunal competent to determine the fact. The establishment of this fact is necessary to entitle the plaintiff to issue the execution. He cannot assume it, and call upon the defendant to disprove it. He must show affirmatively that the event has happened. And for this purpose a *scire facias* should have been issued. *Gorman* v. *Richardson* has been relied upon as a case in point to show that a *sci. fa.* was unnecessary. The facts in some respects are similar, but in that case there was an explicit admission, upon the record, by the defendant's attorney, at the time of confessing the judgment, that the partnership was dissolved. This rendered a *scire facias* useless. The other cases cited by the plaintiff's counsel belong to a peculiar class, and are easily distinguishable from the present.

Sergeant, J.—(After consulting with Mr. Justice Kennedy, who came into court at the close of the argument,) pronounced his decision as follows:—The first objection which has been taken to the judgment is, that it was entered without a declaration having been filed, according to the terms of the warrant, which is of an anomalous character, as it and the bond are incorporated together, and form in fact but one instrument. But I think that a strict compliance with such a clause in a warrant of attorney accompanying a bond, has been dispensed with by the act of 24th February, 1806. The 28th section of that act requires the prothonotary of any court of record within this commonwealth, on the application of any person being the

holder of any instrument of writing containing a warrant to any attorney at law to confess judgment, to enter the judgment without the agency of an attorney, or declaration filed. This section seems to control the language contained in the warrant of attorney in this case. It is next urged that the judgment has been entered of the wrong term. It appears to me, however, that the expression "last term," in a warrant, includes the term of the execution of a bond and warrant, as the words are referable to the commencement of the existing or present term. It is also contended that the omission of the prothonotary to transcribe on the docket the terms of the agreement for stay of execution, avoids the entry of the judgment. Such an objection might, as in the cases cited in support of this point, be of consequence between the plaintiff and the prothonotary, or between the plaintiff and the sheriff, but it is a matter of no importance as between the plaintiff and defendant, on a question as to the validity of the judgment. These are the grounds upon which the rule has been taken to set aside the judgment, but I do not think they are sufficient.

The objection to the execution is, that the plaintiff did not first issue a *scire facias* calling upon the defendant to show cause why the plaintiff should not have execution of his judgment, because of the happening of one of the contingencies specified in the warrant, other than the nonpayment of the several notes. I am inclined to think that the plaintiff was bound to follow this course. The issuing of a *scire facias* is the most direct and appropriate method to ascertain whether the terms upon which execution was to stay, have been violated by the defendant, or whether any of the contingencies upon which it was to issue have ever happened. Here the plaintiff alleges, that although none of the notes have matured, yet the partnership between the defendant and William Montelius, Jr., has been dissolved, which, if true, would give the plaintiff a right to

issue an execution. But this is denied by the defendant. Can the court decide between the parties? A partnership may be dissolved in a variety of ways, but only on a certain state of facts which must be established before a jury, and not assumed by the court. Upon the whole, I am of opinion that the *scire facias* must be issued, as the case is somewhat like that of *Adams* v. *Bush*, 5 Watts 289, where this court seems to have decided the point.

Execution set aside.*

Forchheimer *v.* Feistmann alias Fatman.

[October 6, 1845.]

In an action on a bill of exchange drawn and payable in a foreign country, an affidavit of defence averring want of notice of non-payment or non-acceptance, is defective, unless it show that notice *could* have been given to the defendant.

In this case the plaintiff filed copies of two foreign bills of exchange, drawn by defendant, by the name of Feistmann, in Munich, Bavaria, upon the Messrs. Allman, and

* In debt on bond with condition for the payment of money by instalments, the plaintiff must proceed according to the provisions of the statute of 8 & 9 W. 3, c. 11; and, therefore, if judgment be obtained for want of an affidavit of defence or otherwise, in such action commenced by writ, the plaintiff cannot have execution upon motion as to instalments falling due after the impetration of the writ; but must proceed by *scire facias*, &c. *Longstreth* v. *Gray*, 1 Watts 60. But it is otherwise upon a judgment by bond and warrant of attorney, without writ, for the payment of money by instalments, for then, though the better course is to move the court for leave to issue execution for a particular sum, in the first instance, yet this is not the only course, and an inquiry as to whether too much is demanded is equally open to the defendant after execution as before. *Skidmore* v. *Bradford*, 4 Barr 296. Judgments on warrants of attorney have never been considered as within the statute. *Reynolds* v. *Lowry*, 6 Barr 465; *Bank of Chester* v. *Ralston*, 7 Barr 482.

[Forchheimer v. Feistmann.]

Ross & Brother, in Augsburg, for 2015 florins, payable to the order of Marcus Pflaum, and by him endorsed to plaintiff.

The defendant filed an affidavit of defence, averring that from his dealings with the drawees he had a right to draw on them, and that no notice either of non-acceptance or non-payment had been given to him.

Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence.

Brightly, for plaintiff.
H. M. Phillips, for defendant.

SERGEANT, J.—Held, that the affidavit was insufficient in not showing that notice could have been given to the defendant. It was easy for him, if he had been a resident of Bavaria at the maturity of the bills, to have stated it in his affidavit.

Judgment for plaintiff.*

* Notice to an endorser must be given, although he is beyond sea, if the place of his residence be known; and reasonable diligence must be used to find out his place of residence. But where, at the time of the endorsement, the defendant lived in Philadelphia; and afterwards, and before the note became due, went to New York, with an intention to embark for England, which intention was known to the makers of the note, but not to the endorsee, notice left at his last place of residence in Philadelphia, was ruled to be sufficient. *M'Murtrie* v. *Jones*, 3 W. C. C. 206; 1 Am. Lead. Cas. 415.

In the district court for the city and county of Philadelphia, it has been determined that an affidavit of defence that alleges facts, which, if proved on the trial, would oblige the plaintiff to show that he was a *bonâ fide* holder, for value, of the note sued upon, is sufficient to prevent judgment. And it is sufficient for that purpose to show that the note was given in the name of a firm by one member thereof, for his private debt, without the knowledge and consent of his co-partner. *Purves* v. *Corfield*, March 8, 1851, MS.; *Heath* v. *Sanson*, 2 B. & Ad. 291.

Middleton *v.* Rice.

[February, 1845.]

Though a limitation to a widow so long as she remains unmarried, is good, yet if a legacy or bequest of personal property be given to a party for life, with a condition subsequent annexed thereto, that if the legatee marries, the legacy is to go over; it seems such condition is bad.

Where a testator directed his executors to pay annually two hundred dollars of the proceeds of his real estate to his widow, for the support of herself and his children, to be paid monthly, until his youngest son should arrive at the age of twenty-one, provided, however, that his wife remained his widow that long, and in case she again married, the bequest to cease from the day of her marriage; *held*, that the bequest over was void.

This was a case stated to try the legal effect of the following clause in the last will of Daniel Rice, of Delaware county:—"Item, I give and bequeath to my loving wife Deborah, all my household and kitchen furniture, together with all the grain, flour, meat and vegetables, in and about the house at the time of my decease, absolutely, and to be at her own disposal; and I do order and direct my said executors to put out my real estate to the shares as hereinafter directed, and out of the proceeds of the same, yearly and every year, to pay to my said wife, for the support of herself and children, two hundred dollars, and that to be paid in monthly payments. And the remainder of the said proceeds to be laid out annually in fencing, lime and manure, if necessary for the place, until my son Daniel arrives at full age, provided, however, that my said wife remains my widow that long. And in case she again marries, the above bequest of two hundred dollars annually is to cease from the day of her said marriage."

Dunlap and *Meredith*, for plaintiffs.
Dillingham, for defendants.

The opinion of the court was delivered by

KENNEDY, J.—Contracts in restraint of marriage are regarded as being contrary not only to the law and order of our nature, but likewise contrary to sound policy, and therefore ought to be considered illegal and void. Marriage, no doubt, may be made the subject of regulation by qualified restrictions under certain circumstances, but under no circumstances whatever ought a general and entire restriction of it to be countenanced and sanctioned by law. Accordingly, a covenant not to marry any person but the covenantee, under a penalty of one thousand pounds, without any consideration to support it, was held invalid in law, and that no action would lie to recover the penalty, *Lowe* v. *Peers*, 4 Burr. 2225. The judgment of the king's bench in this case was afterwards affirmed upon writ of error in the exchequer chamber. Lord Chief Justice WILMOT, in delivering the opinion of the court, observed:—"It would be endless to enumerate the duties which are the objects of moral obligations, both in a state of society and out of it; gratitude, charity and all parental and filial duties beyond mere maintenance. Friendship, beneficence in all its branches, and many more which might be named, are duties of perpetual obligation, and I cannot name a greater than matrimony, being one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind. For the precept of multiplication has been always expounded by the civilized world to mean multiplication by the medium of matrimony, and not promiscuous copulation; and there cannot be a duty of greater importance to society, because it not only strengthens, preserves and perpetuates it, but the peace, order and decency of society depend upon protecting and encouraging it." See *Wilmot's Opinions and Judgments*, 371. He also proceeds further to state that "the writers upon the law of nations consider contracts to omit such duties as void; nay, they

consider an oath to perform them as not obligatory. *Grotius, lib.* 2, *ch.* 13, § 67. A covenant of this kind does not only hinder a greater moral and social good, it does not only interfere and check that '*profectum in bono*' which we owe to God and our country, but it tends to evil, and to the promotion of licentiousness, it tends to depopulation, the greatest of all political sins; it is a contract '*vergens ad publicam perniciem*,' and therefore has a moral turpitude in it." And he also shows that it is much worse than a covenant of perpetual chastity, which extends to all unlawful as well as lawful intercourse, because a covenant in restraint of marriage only interdicts the innocent gratification of a natural appetite, and leaves the party at full liberty to a criminal indulgence of it. Therefore to entertain an action for the breach of such contracts, would be setting the laws of God and man at variance with one another, and would be making the common law counteract its own favourite dominant principle "*salus populi suprema lex*." In *Baker* v. *White*, 2 Vern. 215, a bond from a widow not to marry again, was decreed to be delivered up, though there was a counter bond to pay a sum of money to her executors if she did not. Vide also, *Key* v. *Bradshaw*, Id. 102. "Conditions also, in restraint of marriage, are odious; and are therefore held to the utmost rigour and strictness. They are contrary to sound policy. By the Roman law, they are all void," says Lord MANSFIELD, in *Long* v. *Dennis*, 4 Burr. 2055. "Conditions precedent," he further observes, "must previously exist," (meaning that they must be performed, otherwise the gift cannot take effect.) "Therefore in these, there can be no liberality except in the construction of the clauses. But in cases of conditions subsequent, it has been established by precedents that where the estate is not given over they shall be considered as only *in terrorem*." *Fry* v. *Porter*, 1 Chan. Ca. 138; 1 Mod. 86, 300; 2 Chan. Rep. 26; *Pullen* v. *Ready*, 2 Atk. 587; *Harvey* v. *Aston*, 1 Atk. 361; *Scott* v. *Tyler*, 2 Bro.

Ch. Rep. 431. "This shows how odious such conditions are, for, in reason and argument, the distinction between being or not being limited over is very nice; and a clause can carry little terror which is adjudged to be of no effect." We must however be careful not to confound limitations with conditions, for limitations may be good notwithstanding they are seemingly in restraint of marriage, and were so by the civil as well as the common law. As, for instance, where the meaning of the testator is not to forbid marriage, but to grant the use of the thing bequeathed until the legatee shall marry; *Swinburne, part* 4, *ch.* 12, § 6; or where the prohibition of marriage is not made conditionally by this word *if*, (as, I make thee my executor, if thou dost not marry,) but by other words or adverbs of time; as, when the testator willeth that his daughter or wife shall be executrix or have the use of his goods, so long as she shall remain unmarried. Agreeable thereunto are the laws of this realm of England, wherein there is a case that one of the kings of this realm did grant to his sister the manor of D. so long as she should continue unmarried, and this was admitted to be a good limitation in the law, but not a condition. *Swinburne, part* 4, *ch.* 12, § 19. But where a legacy is given on marriage, with consent merely, and there are no words to vest the legacy, the consent is a condition precedent, so that nothing becomes due until marriage, for by the civil law as well as by the common law, if money be given to be paid at a time or upon an act previous to the payment, nothing becomes due or can be demanded, till the time incurred or the act performed. *Harvey* v. *Aston*, Com. Rep. 744.

Although in cases of conditions subsequent, it seems to be established, that where there is a bequest over upon non-compliance with a condition requiring consent to marriage, the executory bequest will take effect upon a breach of the condition by the primary legatee, so that it shall not be considered *in terrorem*, yet I apprehend, in no case has it been

held, that if a legacy or bequest of personal property be given to a party either absolutely or expressly for life, with a condition subsequent annexed thereto, if the legatee marries, the legacy or bequest shall be given to a third person, such shall be good or available to the third person, because the condition being an absolute prohibition of marriage upon any terms whatever, must be considered as wholly void and of no effect. Accordingly, Ch. Baron COMYN, in *Harvey* v. *Aston*, Comyn's Rep. 729, in speaking of what he seems to think uncontroverted on both sides, says, "If a portion be given on the consideration that the daughter should never marry, I think such a condition should be rejected as repugnant to the original law of the creation of mankind." See also, *Godolph. Orph. Leg. part* 2, *ch.* 17, § 6. And of this opinion was Lord Chief Justice WILLES, when it cannot be construed into a limitation. Willes' Rep. 94. Also in *Salisbury* v. *Bennet*, Skinner's Rep. 286, where it is said by RAWLINSON, Justice, conditions wholly to restrain marriage are odious, as that a woman shall not marry, or shall not marry before sixty, and therefore (as in the civil law) are void. Indeed, I am not aware of even a dictum to the contrary, by an English judge or chancellor, except that of Lord THURLOW in *Scott* v. *Tyler*, 2 Bro. Ch. Ca. 488, where he is reported to have said, that a condition that a widow shall not marry is not unlawful. He must, I presume, have taken this idea from the civil, or rather the canon law, which, it is said, made conditions against marriage void as to virgins, but allowed them as to widows, especially if the legacy was given by a husband to his own wife. *Godolph. Orph. Leg. part* 3, *ch.* 17, § 9. Such a distinction may have existed at Rome, and have proceeded from a selfish pride or ungenerous prejudice on the part of husbands or ecclesiastics, who were most likely the lawgivers there. To the credit, however, of English lawgivers, I think it may be said, that it never entered into their minds to make any distinction of this sort. For certainly it does

not appear to be sustained by any principle of nature or sound policy. Why should a widow of twenty-two be restrained from marrying more than if she had never been married? This dictum of Lord THURLOW seems to be impugned by the decision of the supreme court of Massachusetts, in *Parsons* v. *Winslow*, 6 Mass. Rep. 178, and particularly by what fell from Justice SEDGWICK, in delivering the opinion of the court, who says—"The real intention of the bequest was for the life of the wife, on condition of being void in the event of her marrying. Had this been a condition precedent, it would have defeated the gift; but when the condition is subsequent, as this is, and the legacy is not given over, it is considered merely *in terrorem*, and the condition is void, because it puts a restraint upon matrimony, which ought not to be discouraged." It is true that Mr. Justice STORY repeats the dictum of Lord THURLOW in his 1 *Equity Jurisprudence*, § 285, without comment, but it is manifestly repugnant to all that he has recognised and laid down as the law in that valuable work of his. In § 280, he says—"If the condition is in restraint of marriage, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void. And so if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seized of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to the probable prohibition of marriage, *Kelly* v. *Monck*, 3 Ridgw. Parliam. Cases, 205, 244, 247, 261." I cannot refer to any case, embracing a devise of real estate upon a condition subsequent in restraint of marriage generally, in

which the condition has been adjudged to be void, but such would seem to be, I think I may say, the universal opinion entertained by judicial men on this point. In *Perrin* v. *Lyon*, 9 East 170, which was a devise of real estate, subject to a condition of a partial restraint of marriage, it may be fairly inferred, if the restriction had been general, that Lord ELLENBOROUGH would have held the condition void. Accordingly Mr. Jarman, in his edition of Powell on Devises, 2 vol. 291, observes; that "even in regard to real estate it seems to be generally admitted, (though the point rests rather on principle than decision) that unqualified restrictions on marriage are void on grounds of public policy." In the case under consideration the testator has directed his executors to pay annually two hundred dollars of the proceeds of his real estate to his widow for the support of herself and her children, to be paid monthly, until his son Daniel shall attain the age of twenty-one years; provided, however, that his wife remains his widow that long, and in case she marries again, the bequest of two hundred dollars annually is to cease from the day of her marriage. Had the testator directed the two hundred dollars annually to be paid to his wife as long as she remained a widow, such limitation, according to the authorities referred to above, would have been good, and her subsequent marriage would have terminated her right to receive any longer the annuity. But this is not the form of the gift; it is given to her, not during her widowhood, but expressly until the testator's son Daniel shall arrive at full age, provided, however, that his said wife remains his widow that long, and in case she again marries, the above bequest of two hundred dollars annually, is to cease from the day of her said marriage. Thus the restriction upon the wife's marriage generally, is superadded as a condition subsequent to the previous limitation, that the annuity should be continued to be paid to her by the testator's executors until his son Daniel should arrive at full age. It being then both in form and substance a con-

dition subsequent and not a limitation of the devise, it must be considered as void according to the principles set forth in the premises, as being contrary to the first law of our nature, and to an institution pre-eminently calculated to promote the very best interests as well as the true happiness of mankind in the very highest possible degree. The plaintiffs are therefore still entitled to demand and receive the annuity of two hundred dollars, monthly, until Daniel the eldest son of the testator shall arrive at full age, if he should live so long, and judgment is directed to be entered for the amount of principal and interest due and in arrear according to the case stated.*

* The question discussed by the learned judge in the foregoing able opinion, has been since elaborately argued before the supreme court in *banc*, and the law is now settled in Pennsylvania, that on a devise of *real* estate to the testator's widow for life, a condition thereto annexed, *that she remain his widow*, is valid; and on a second marriage her estate in the land is divested. *Com.* v. *Stauffer*, 10 Barr 350; *Bennett* v. *Robinson*, 10 Watts 348. But a condition in restraint of marriage annexed to a bequest of *personal* estate, is void. *Hooper* v. *Dundas*, 10 Barr 75; *M'Ilvaine* v. *Gethen*, 3 Wh. 575.

Street *v.* Silver.

[NOVEMBER 24, 1846.]

Where one guaranties the payment of a sum of money, on a day certain, the creditor, when the period arrives, may sue on the contract of guarantee, without pursuing the principal debtor.

If a patentee be not the first or original inventor, in reference to all the world, his patent is void, even if he had no knowledge of the previous use or description of the invention. And the law is the same as to an improvement.

An improvement, to entitle the inventor to a patent, must be not only new, but useful. And mere colourable or slight improvements cannot affect the rights of the original inventor.

The use of different terms or names to substantially the same thing, will not validate a patent for an improvement; nor will the change of the form or position of any machine, or composition of matter, or an alteration of the quantity or proportion of the materials, destroy the rights of the original patentee.

If the specification includes as well the original discovery as the alleged improvement, and does not point out in what the improvement consists, the patent is void.

THE facts of this case sufficiently appear in the charge of the court.

M'Laughlin and *F. W. Hubbell*, for plaintiff.
Perkins and *Mallery*, for defendant.

ROGERS, J., charged the jury as follows:—This is an action to recover the amount due on a contract dated the 16th March, 1844, entered into between Gideon G. Palmer and the plaintiff, John Street. By the agreement, Palmer, in consideration of a transfer or assignment of the plaintiff's right to a patent dated the 21st November, 1843, for an improvement in the manufacture of an artificial writing slate, agreed to pay to Street the sum of five thousand dollars, viz. three hundred dollars in hand, and four thousand

seven hundred dollars in one year from the date, viz. the 16th March, 1845.

The improvement consists in the application of a silicious composition to wood, for the purpose of forming a wooden writing slate. The patent is for a wooden writing slate of a variety of colours, formed by the application of the composition (particularly specified and described) to a smooth surface of wood of any desired size or thickness.

To the action, which is against the defendant who guarantied the payment of the unpaid purchase money, the defendant pleads *non assumpsit*, payment and set-off, with leave, &c. To support the action, the plaintiff gave in evidence the patent, dated the 21st November, 1843; an agreement dated the 16th March, 1844, between Street and Palmer, and the guarantee, of the same date, for the payment of the consideration money by the present defendant, Joseph S. Silver; and an assignment of the patent, of the same date, to Palmer. And, after proving a demand on Palmer and Silver, to perform their contract, and a refusal by them to pay, rested his case.

If this was the only proof in the case, there is no doubt the plaintiff would be entitled to a verdict. Whether the defendant made a good bargain or a bad one is of no sort of consequence. We leave the parties to make their own contract, and in the absence of any thing like fraud and imposition, (which is not pretended) all you would have to do would be to compel the defendant to perform his part of the contract in good faith. It would be your duty to render a verdict for the plaintiff, for the sum of four thousand seven hundred dollars, with interest from the 16th of March, 1845; for, I instruct you, that in order to sustain this suit, it is not necessary that suit should have been previously brought and prosecuted to judgment against Palmer. This cause is to be tried in the same manner as if the suit had been brought against the principal instead of the surety.

[Street v. Silver.]

But the defendant denies the right of the plaintiff to recover, because, as he says, there is no consideration for the contract. He contends there is no novelty in the invention, no improvement whatever in the manufacture of artificial slates. That, in truth, no patent ought to have been granted, because it was neither an original invention, nor an improvement on an invention before known. The patent is *primâ facie* evidence in favour of the plaintiff; the burden of proof is thrown upon the defendant: he must satisfy you that the improvement claimed in the patent is not new, or is not useful.

In reference to the points of law, there is no difficulty whatever. According to the law in this country, if the patentee be not the first or original inventor, in reference to all the world, he is not entitled to a patent; even although he had no knowledge of the previous use or previous description of the invention. The law presumes he may have known of it. It cannot be pretended that the manufacture of artificial slates is an original invention of Mr. Street; nor do I understand that he contends he made an original invention, but that it is an improvement in the manufacture of articles already known. But whether it be an original invention or an improvement, the law, as to his right to a patent, is the same; for, any person being a citizen of the United States, and any alien who, at the time of his application, shall be a resident of the United States, and who shall have invented any new and useful art, machine, manufacture, *composition of matter*, or any new or useful improvement in the same, *not known* or used before the application, is entitled to a patent. He is entitled to the benefit of his improvement, although not to the use of the original invention; nor has the inventor the right to use his improvement.

That a process was known and in successful practice, for making artificial slates, in Germany, as early as 1812, we cannot doubt. It also appears that an analysis and

publication was made of the invention, in the literary and scientific journals of France, in the year 1832; and it was also known in the United States. The usual method seems to have been by an application of a certain composition described to you, to pasteboard, or to a combination of wood and pasteboard. If you are to believe the witnesses, Messrs. Mentz and Luch, this composition has been applied directly to wood, certainly as early as 1841. If Mr. Luch's testimony is entitled to regard, pasteboard has been substituted for wood, because it was found by experience to make a better article.

The patent is for a wooden writing slate of a variety of colours, formed by the application of the composition to smooth surfaces of wood of any desired size and thickness. The present patent, being of wood, would seem, if you credit the witnesses, to be neither novel nor useful, and therefore, on that ground alone, the plaintiff would not be entitled to a patent. The improvement must not only be new, but useful: in both particulars it is deficient. It would seem, from the patent, that what the patentee claims as his invention or discovery, is the application of a silicious composition to wood, for the purpose of forming a wooden writing slate. But whether this be new, or an improvement, will be for the jury to determine. Forming a variety of colours would appear to be of no sort of consequence; that would be a very small operation, which would not of itself entitle the plaintiff to a patent.

But, it is said there is an improvement in the composition of the matter of which the slate is composed; if so, the plaintiff is entitled to a patent. If the materials of which it is composed are different—a different combination or compound—your verdict must be in favour of the plaintiff. Mere colourable or slight improvements cannot affect the rights of the original inventors; although the jury will recollect, that it does not depend on the degree of the improvement; for the question is, is it a *useful* im-

provement? But, if you should be of opinion, that the materials which enter into the composition are substantially or essentially the same, then the verdict must be for the defendant: it must be a substantial, material improvement; mere colourable or slight improvements cannot affect a person's rights. In that case, the patent would be worthless, and the defendant is not bound to pay unless he receives some equivalent. The defendant is not bound for moonshine. On this point of the case, you will inquire of what materials the German and American articles are composed. Is the groundwork of both substantially the same? that is, is each composed of silex, lampblack and linseed oil? are these the principal ingredients of which each of the compositions is formed? If they are, then it is no improvement for which a patent can be granted; the patent is void.

Any different terms or names to substantially the same thing, will not validate the patent. As it must be a substantial, useful improvement, it follows, that simply changing the form or position of any machine or composition of matter, is not a discovery within the statute. Nor will it be so, that different materials are used in a composition to produce precisely the same result. It is not every alteration or change in the quantity or quality of a composition which will entitle a person to a patent. For, if it would, the original patent would be worthless, for all that would be necessary would be to change the proportion to destroy the right of the patentee. The question is not whether the compositions are identical, but are they substantially the same? This is a question of fact, which the jury must decide. The question is, whether the patentee is the inventor of a substantial and essential improvement in the mode of making artificial slates; if he is, the plaintiff is entitled to a verdict for four thousand seven hundred dollars, with interest from the 16th of March, 1845; if he is not, the verdict will be for the defendant.

But the plaintiff contends that he is entitled to a verdict, because, whatever may have been the fact of the original invention, the patentee, Street, believed himself to be the original discoverer or inventor of the thing thus patented, and that it has not appeared that the same, or any substantial part thereof, had before been patented or described in any foreign publication. That although the composition may have been applied to wood, yet no application has been made of it in any printed publication. Now, admitting that the power in the act of congress applies to improvements, and is not confined to an original, and I instruct you it does, yet the testimony, if believed, proves that the application to wood is not an improvement, but renders the article of less value, for reasons, of which you will judge, given by the witnesses.

It is the opinion of the court, that the substitution of wood, instead of pasteboard, is not such an improvement as entitles a person to a patent. If this be so, whether used in this country before 1843, would seem to be immaterial. If the materials of which the composition is formed are the same, a substantial part has been described in a printed publication.

It is the law that the patentee is entitled to no more than his improvement. If, therefore, the inventor of an improvement obtain a patent for the entire machine or composition, and the new and old discoveries are incorporated in his specification, the invention is neither novel nor his own. The patent being broader and more extensive than the invention, and the patentee claiming thereby things which are the invention and property of others, it is totally void. The invention must be substantially new, and the specification must point out the improvement of the patentee, so as to show in what the improvement consists. This is law, but it does not strike me that the specification is so defective in this particular, although not very precise, as that I should be justified in pronouncing as a matter of

law, that the patent was null and void. What the patentee has described and desires to secure by the letters patent, is a wooden writing slate, of a variety of colours, formed by the application of the composition described to smooth surfaces of wood of any desired size and thickness. This is a specification which will support the patent issued.

The only question which you will have to decide, is, whether the patentee has made a substantial, material improvement of an article known and used before the date of his application for a patent. If you believe he has, find for the plaintiff; otherwise, render a verdict for the defendant. If you believe that the improvement is new and useful, find for the plaintiff; if otherwise, find for the defendant. There is no middle course; the plaintiff is entitled to the whole amount claimed, or nothing.

It is not my intention to express any opinion on the question. It is however my duty to say to you, that, on a question of this kind, the opinion of scientific and practical men is entitled to great weight, although by no means conclusive. At the same time, you will recollect, that the burden of proof is thrown upon the defendant.

Verdict for defendant.

Fleming *v.* The Insurance Co.

[March, 1847.]

A judgment of non-suit ordered to be entered on motion of the defendant, by the judge presiding at the trial of a cause in the district court for the city and county of Philadelphia, under the seventh section of the act of 11th March, 1836, is not a bar to a subsequent action brought against the same defendant by the same plaintiff for the same cause.

This was an action of covenant, brought by Joseph Fleming to the use of John M. De Bolle against the Insurance Company of the state of Pennsylvania, upon a policy of insurance.

[Fleming v. The Insurance Co.]

The defendants filed several special pleas, one of which stated, in substance, that a former action of covenant upon the same policy, for the same cause, had been brought by the same plaintiff against the defendants in the district court for the city and county of Philadelphia; in which the defendants had pleaded *non infregerunt*, &c.: that upon the trial of that action, after the plaintiff had produced his evidence, and closed his case, the judge presiding at the trial had, on motion of the defendants, directed a non-suit, with leave, &c., under the 7th section of the act of March 11, 1836: and that the plaintiff had afterwards moved the court in *banc* to set aside the said judgment of non-suit, which was refused. To this plea the plaintiff demurred, and the defendants joined in demurrer.

The 7th section of the act of March 11, 1836, *Purdon*, 268, is as follows:—"Whenever the defendant, upon the trial of a cause in the said court, shall offer no evidence, it shall be lawful for the judge presiding at the trial, to order a judgment of non-suit to be entered, if, in his opinion, the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court in *banc* to set aside such judgment of non-suit; and in case the said court in *banc* shall refuse to set aside the non-suit, the plaintiff may remove the record by a writ of error, into the supreme court for revision and reversal, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence."

C. Ingersoll, for plaintiffs.—A non-suit is not a bar to another action for the same cause. Co. Litt. 139 a; Purdon, 268; 3 Wils. 149; *Milchard* v. *Halsey*, 6 Com. Dig. 277, Pleader, X. 4; 7 Bouv. Bac. Abr. Pleas, 11, p. 619.

L. A. Scott, for defendants.—This is not the ordinary non-suit, which is a mere default, 3 Bl. Com. 376, and can-

not be forced upon a plaintiff, 2 Binn. 234, 248; 1 Serg. & Rawle, 360; 2 T. R. 265; 3 Ad. & Ellis, 166; and which he has a right to suffer at any moment, 4 Watts, 308; 9 W. & S. 153. Here, after a full trial, the judgment of the court was against the plaintiff; and it is to be presumed that another trial must result in the same way. There is no allegation of accident or surprise. A writ of error will lie upon the judgment, which would be worse than useless if the plaintiff can recommence his action, after the judgment is affirmed. 2 Watts 108; 4 T. R. 436. The motion for a non-suit is a demurrer to the evidence, 3 W. & S. 14; 9 W. & S. 187; Gould's Pleading, chap. 9, § 47, &c. The plaintiff's rights are pointed out by the act. The right to a jury trial is not touched by our construction, and the act saves time.

C. Ingersoll, in reply.—The question might have been different, had the plaintiff taken a writ of error. The question is on the construction of a statute, and the argument from inconvenience cannot apply. The act calls it "a judgment of non-suit,"—the right to a jury trial would be infringed if the non-suit were held to be final.

The following opinion was delivered by

Gibson, C. J.—It certainly was held in the cases quoted, that a motion for a non-suit under this statute, is like a demurrer to evidence; not, however, as regards the effect of the judgment consequent upon it, but as regards the inferences that may be made from the evidence. It is settled, that the court may infer any fact from it which a jury might infer, or which a demurrant would be compelled to admit. What next? Should the evidence still be insufficient to make out a case, the court is to give judgment, not for the defendant, as in the case of a demurrer, but of non-suit. Now, in the case of a non-suit, as the plaintiff is merely called, and his silence recorded, there is strictly no judgment

at all; and though it is peremptory in attaint, appeals of felony, and in one or two other cases practically unknown to our jurisprudence, it has been universally understood in Pennsylvania to be no bar to a subsequent suit for the same cause. Such is both the technical and the popular understanding of its consequences. It is, however, called a judgment in the statute under consideration, as it was called in the 14 G. 2, c. 2, which enables a judge at nisi prius to give judgment, "as in case of non-suit," when a plaintiff refuses to bring on his cause sent down for trial under a proviso rule. Now had this judgment of non-suit, under the act of assembly, been intended to have the effect of a judgment on demurrer to evidence, why was not the court ordered to give judgment directly for the defendant, which would have been the more immediate and sensible course of attaining the end? Or why, since it was known that the defendant might attain it by a demurrer to evidence, did the legislature interfere at all? Certainly not to relieve him from the risk attendant on a demurrer, and at the same time give him the benefit of it; for if the plaintiff were driven to the necessity of staking his case on the court's view of the evidence, the defendant ought, on every principle of reciprocity, to do the same. The object plainly was to save time by compelling a plaintiff who could show no case, to submit to a non-suit; without driving the defendant to the perilous step of such a demurrer. The power of barring the plaintiff's access to the jury, is an arbitrary, though a necessary one; and as it derogates in some measure from a constitutional right, it is not to be enlarged by construction. It is true that the defendant could have barred it to the same extent by a demurrer to evidence; but this is attended with so much risk, that resort is seldom had to it, and it can scarce be said to be a practical impediment to trial by jury. By reason of this, the parties often went to the jury with a flourish of trumpets, when there really was nothing to try; to remedy which, the legislature directed the judge to step

in and turn the plaintiff out of court, not depriving him of his writ of error, or a right to go before another jury with a better case. It is said there may be reason for allowing such a right to a plaintiff who has been driven to a voluntary non-suit by accidental inability to bring forward the whole strength of his case, occasioned by accident and surprise, which does not exist in the case of one who has deliberately brought it forward and failed. But how does it appear that the latter is not equally prevented and taken by surprise, when he is tripped up the instant he has closed his evidence? The former may not only deliberately go before the jury with his case, but take the opinion of the judge on it, and a non-suit, even when the jury are ready to deliver their verdict. It may be said that this is not by statute, but by the course of the common law; but it is not entirely so.

The "act further to regulate proceedings in courts of justice," allows him to suffer a non-suit at the latest moment; and yet no one has ever dreamt that it precludes a second action for the same cause. The privilege would be a barren one if it did; and this shows that the legislature has not viewed a non-suit as a judgment to that effect. Why then should it be supposed that a different effect was intended to be given to an involuntary non-suit, which precludes every thing like deliberation? It is a rule of construction, that statutes are to be interpreted as near as may be to the principles of the common law; and technical terms are to be understood in their technical sense, unless it clearly appear by the context that they were intended to be understood on a different one. "It is to be presumed that the legislature know how to use terms applicable to the subject matter," *Dwarris* 707; and in this instance it doubtless knew the technical consequences of the judgment it prescribed. The plea is therefore bad.

Demurrer sustained, and judgment of *respondeat ouster*.*

* Bournonville v. Goodall, 10 Barr 133.

Dailey *v.* Beck's Executors.

[MARCH, 1847.]

It seems, that a conveyance of a lot, on ground rent, described as "*bounded on the south by Beck street, to be laid open fifty feet wide, from Sixth street to Seventh street*," created a covenant that the street should be opened of that width to give access to the lot; and that such covenant while it remained unbroken ran with the land.

But an action for a breach of such covenant could be maintained only by him who was the owner at the time of the breach, and not by a subsequent grantee.

THIS was an action of covenant brought by Michael Dailey and others, against the executors of Paul Beck, deceased, under the following circumstances.

On the first of November, 1796, Paul Beck and wife conveyed to Taylor & Black, a certain lot described in the deed as "bounded on the south by Beck street, to be laid open fifty feet wide, from Sixth street to Seventh street," reserving ground rent. The plaintiffs deduced their title regularly from Taylor & Black, and contended that the words in the deed amounted to a covenant on the part of Mr. Beck, to open Beck street, fifty feet wide, between Sixth and Seventh streets.

The defendants pleaded *non est factum*, *non infregit*, *&c.*

They also pleaded specially, that the breach of the covenant, if any, occurred before the seizin of the plaintiff; that the ground through which Beck street was to have been opened, had been permanently converted to other uses than those of a street.

They also pleaded a release from each of the parties successively seized of the premises, and the statute of limitations.

The case was argued on a demurrer to these pleas.

Hare, in support of the demurrer, cited 9 B. & C. 503; 17 Wendell 136; Dyer 337; 1 Maule & S. 355; 4 Maule

& S. 53; 5 Taunton 418; 1 Smith's Leading Cases 82; Peck 106; and Paige 359.

E. Lewis and *F. W. Hubbell*, contra:—7 Bing. 682; 3 B. & C. 332; 3 Camp. 514; 16 Wendell 531; 2 Whart. 123; Cromp. & Meeson 644; 11 Mass. 306; 16 Mass. 161; 16 Wend. 16.

GIBSON, C. J.—The bent of my mind is, that the words relied on, create a covenant, though I have no little doubt on the subject. They appear to have been intended for more than description; for it seems to have been a substantial part of the contract, that the street should be opened to give access to the lot, without which it would have been of little value. It is described as bounded on the south "by Beck street, to be laid open fifty feet wide, from Sixth to Seventh Street." And the specification of the width seems to be matter of stipulation rather than of description. I am of opinion too, that this covenant while it remained unbroken ran with the land, though it related not to any thing to be done on the lot. But it is admitted by the pleadings, that it was broken in the time of the original grantors, and long before the plaintiffs purchased the property, and as there could, from the very nature of the covenant, be but one breach of it, there could be but one satisfaction. If there could be more, every succeeding day would give a new cause of action, and subject the grantor to interminable litigation. It results, that the whole injury was to be compensated in one action; and consequently that it could be maintained only by him who was owner at the time of the breach.

Demurrer to the fifth plea sustained, but the demurrers to the other pleas overruled; and judgment for the defendant.*

* In *Bellinger* v. *The Union Burial Ground Society*, 10 Barr 135, the supreme court determined that a sale of a lot by a plan, on which a public street is

Com. ex rel. Keller *v.* Roberts.

[APRIL, 1847.]

The legislature can compel witnesses to answer questions, the answers to which may not show them to be criminal, but may involve them in shame and reproach: *therefore*, a witness may be compelled to answer, under the act of 16th March, 1847, whether he has purchased lottery tickets from the defendant.

THIS was a *habeas corpus*, directed to Edward Roberts, a constable. It appeared that one Edward Parker had been charged, before Alderman Brazer, with the offence of selling lottery tickets; on the hearing of which case the relator, Peter Keller, was called as a witness. The following question was asked him:—"Did you ever purchase any lottery tickets from the defendant?"—which he refused to answer, alleging that his answer to the question would involve him in shame and reproach. Whereupon, the alderman committed him until he should fully answer.

The act of 16th March, 1847, (*Pamph. p.* 476,) provides that "the purchaser of any such lottery ticket shall not be held liable to punishment by this or any other law of the state, *but shall be a competent witness in the cause.*"

laid out as one of the boundaries, and a conveyance describing it as a lot "on Washington street, as the same shall hereafter be opened—and bounded on the south by said Washington street," does not create a covenant, on which the grantors are liable; where the street was subsequently vacated by legislative authority, and the grantors entered upon and occupied the land over which it was laid out. Mr. Justice Coulter said—"the words must be understood to fix the terminus of the grant, and not a covenant that the public should keep the street open for ever—but even upon the concession of a covenant, it would seem that the defendants are discharged; the act alleged to be a disturbance or breach, is the act of the legislature, the sovereign power in the state—to whose acts, when within the pale of the constitution, all persons owe obedience as the law of the land."

An action for the breach of the building covenant in a ground rent deed, cannot be maintained by the assignee of the ground rent, which was assigned to him after the breach occurred. *Fisher* v. *Lewis*, 3 Penn. L. J. 81.

[Commonwealth v. Roberts.]

Doran, for the relator, argued,—1. That the act of assembly does not relieve the purchasers of tickets from their liability for the purchase of any other ticket than that which forms the subject of the indictment. That the acts of 1762 and 1833, making the sale or purchase of tickets a crime, was still in force; and if a person testified that he bought any other ticket than that which forms the subject of the indictment, he could be punished therefor. 2. That the answer might involve him in shame and reproach.

Champneys, attorney general, examined at length the doctrine of privilege as laid down by the English and American authorities.

Rogers, J.—The constitution provides that no person shall be compelled to give evidence against himself. If the question were, as to whether he had committed murder, felony, or other crimes against the law of nature, he would be protected. But the legislature can compel witnesses to answer questions, the answers to which may not show them to be criminal, but may involve them in shame and reproach. The prohibition against the sale of lottery tickets is a statutory offence only. The purchase and sale of them was formerly recognised by our laws, and is still sanctioned in many states of the union. Apart from the legislative prohibition, founded in public policy, no disgrace could be attached to those who buy or sell them. If the relator were fraudulently insolvent, in consequence of the purchase of lottery tickets, and he were asked if such was not the cause of his failure, he could not be compelled to answer. The act of assembly applies to such a case as the present: the prisoner is, therefore, remanded, until the question is answered. Relator remanded.

Mr. Keller gave security for his future appearance before the alderman, to answer the question.

Commonwealth *v.* O'Donnell.

[April 29, 1847.]

The legislature may incorporate aliens, notwithstanding their adverse allegiance: the existence of adverse allegiance goes, not to the power of the legislature, but to the propriety of its exercise.

Aliens cannot be incorporated under the provisions of the act of 6th April, 1791.

In *quo warranto*, where there are issues as well of law as of fact, after judgment for the respondents on demurrer, the complainants cannot discontinue without the consent of the opposite party.

This was a *quo warranto*, issued in the name of the commonwealth, at the relation of the county of Philadelphia, against Nicholas O'Donnell, John O'Donnell, and John Hughes, under the following circumstances:

On the 10th November, 1804, Michael Hurley, Matthew Carr and John Rossiter were incorporated, under the act of 6th April, 1791, by the style and title of "The Brothers of the Order of Hermits of St. Augustine." The charter provided that there should be an annual election of from two to five clerks, or priests of the order, who should be thereby constituted members of the corporation. This annual election having been neglected for many years, and Matthew Carr and John Rossiter being deceased, on the 11th June, 1832, an act of assembly was passed, (Pamph. Laws, p. 606) authorizing Michael Hurley to elect two or more additional permanent members of the corporation, possessing the qualifications required by the charter; discontinuing the annual election of members, and confirming the charter in all other particulars.

The church of St. Augustine having been destroyed by a mob in 1844, suit was brought against the county, and this writ of *quo warranto* was taken to test the authority of the defendants to act as corporators.

The defendants in their pleas alleged that they were the present members of the corporation, legally chosen, under their charter, and the replications did not deny their citizenship. Issues of fact were taken as to whether the original charter was duly granted under the act of 1791; whether the annual income of the corporation exceeded five hundred pounds, to which they were limited by the charter; and whether the defendants were duly elected and qualified. The defendants demurred specially, upon the ground of duplicity, to allegations in the replications, that Carr, Rossiter and Hurley were not citizens of Pennsylvania in 1804 and 1832. And general demurrers were filed to the following replications.

1. That the corporation is a foreign society and order, instituted by a foreign potentate, (the pope of Rome,) holding all the estates and property, offices, franchises, privileges and powers, of which they are seized or possessed under the said foreign potentate, and liable to be dissolved and destroyed by him.

2. That the said Carr, Rossiter and Hurley, when they signed the act of incorporation, were Roman catholic priests, liable to be removed from said office by the bishop of the diocess, or the pope; and that the said bishop was liable to be removed by the pope; and that, at the time of signing, they were under the following obligation and oath, viz. "that they did promise and swear true obedience to the Roman bishop, the successor of St. Peter, the prince of the apostles, and vicar of Jesus Christ, to wit, the pope of Rome."

3. That the said Carr, Rossiter and Hurley, when they signed the said act or instrument of incorporation, were members of the foreign order of "*Fratres ordinis eremitarum Sancti Augustini;*" which said order was under a superior residing in foreign parts, out of the limits and jurisdiction of the United States, to wit, in the city of Rome; and owing allegiance to a foreign potentate, to wit, the

pope of Rome. And that they were liable to be removed from the office and membership of the said order, at the will and pleasure of the said superior; and that they were under an oath of obedience to the said superior.

4. That the said corporation have not kept up a succession of corporators, according to law, but have allowed the same to be destroyed; and the corporate offices, franchises and privileges to become extinct.

H. J. Williams, (with whom was *W. A. Stokes*) argued for respondents.

P. A. Browne, for relators, argued the following points: Can a foreign order, instituted by a foreign potentate, who hold all their estate, franchises and powers under such foreign potentate, and are liable to be dissolved by him, be incorporated under the act of 1791? Can three catholic priests, who are liable to be removed from their offices at the will of the bishop or of the pope, and who have sworn true obedience to the pope, be so incorporated? Can three catholic priests, members of a foreign order of monks, created and existing in foreign parts, under a superior there residing, and owing allegiance to a foreign potentate, and which priests are liable to be removed from the order at the will of the said foreign superior, to whom they have taken an oath of obedience, be so incorporated? Is the charter destroyed by the members neglecting to keep up a succession? And has the act of 11th June, 1832, by declaring that *the charter, so far as the same was not thereby altered and amended, should be and was thereby confirmed, and should continue in full force and virtue*, cured all these defects?

The court declined hearing *W. M. Meredith*, in reply; and the following opinion, on the issues of law, was delivered by

[Commonwealth v. O'Donnell.]

GIBSON, C. J.—If the question stood on the act of 1791, I should hold the charter to be invalid. The efforts of the commonwealth have been mainly directed to show that the original corporators were not citizens of Pennsylvania, within the intent of the statute. Probably they were not, but the charter was, in any event, forfeited, by reason that the succession had not been regularly kept up. The congregation conceded this, when, in 1832, it procured a statute to fill up the gap. The legislature not only enacted it, but authorized the survivor of the original corporators to elect and join to himself two or more permanent corporators, possessing the qualifications required by the charter. This gave the corporation a new *status*, and operated as a confirmation of it, at least from that time. The replications do not deny that the succession has since been regularly kept up, by filling the vacancies with citizens of Pennsylvania. If, then, the legislature had competent power to enact the statute, the corporation is a valid one, and the predecessors of the respondents were legally chosen permanent corporators, in 1832; Mr. Hurley being appointed by the legislature itself. It is immaterial how invalid the charter had previously been, for the respondents do not rely on it, and recourse has been had to it only as matter of inducement. Do any of the replications answer the whole plea? None, unless the legislature had not power to enact the statute of confirmation. I am not aware of any constitutional objection to it. The legislature may certainly incorporate foreigners, notwithstanding their adverse allegiance. And it might have dispensed with the qualification of citizenship in the amended charter: but it did not. Now, the inclination of my mind is, that the existence of adverse allegiance goes, not to the power of the legislature, but to the propriety of its exercise. I would not, in an inferior court, declare the statute to be invalid. As the replications do not answer the pleas, the demurrers are sustained, and judgment is rendered for the respondents.

[Commonwealth v. O'Donnell.]

Subsequently, the prothonotary, by direction of the complainant, entered a discontinuance, which the respondents treated as a nullity, and the case was placed on the trial list, for September term, 1847. When reached, *Mr. Horn R. Kneass*, for the complainant, stated that the case had been settled and discontinued, and objected to going to trial. *Mr. Stokes*, for the respondents, denied the right of the complainant to discontinue, without the consent of the opposite party, after judgment for them on demurrer; and asked for a trial of the issues of fact by a jury.

Rogers, J.—Ruled, that the discontinuance was void; and the case then went on, and a verdict was rendered, on all the issues of fact, in favour of the respondents.*

* A discontinuance can only be entered by leave of the court; in England, this leave is obtained on motion, in the first instance; and here it is taken without the formality of an application, but subject to be withdrawn on cause shown for it; that is the whole difference: the act, when the propriety of it is contested, must, in the one shape or in the other, have the sanction of the court. *Schuylkill Bank* v. *Macalester*, 6 W. & S. 149.

Hermits of St. Augustine *v.* The County.

[NOVEMBER, 1847.]

Mere possession of personal property, is evidence of ownership, and, in the absence of contrary evidence, is to be held conclusive.

The word "persons," as used in the act of assembly of May 31, 1841, is to be construed to mean corporations as well as individuals.

Exemplary, or vindictive damages, cannot be given in an action against the county; damages to the full extent of the injury inflicted should, however, be allowed.

The law does not require a plaintiff in an action brought against the county for damages, suffered by the violence of a mob, to prove every article destroyed; a general estimate will be sufficient to submit to a jury.

In an action of this kind against the county, the jury may allow as damages the full value of the property at the time of its destruction, with interest added to the time of their verdict.

Whether such additional allowance can be made as interest.—*Quere?*

THIS was an action of trespass on the case, brought under the provisions of an act of assembly, passed on the 31st May, 1841, against the county of Philadelphia, to recover damages for property destroyed by a riot. The declaration was in four counts, and set forth the ownership of the property, real and personal, its destruction by a mob, and its value. In one count it was alleged that there was no knowledge on the part of the plaintiffs of an intention to attack the property, in another, that notice was given to the sheriff, and in a third, that there was no time to give such notice.

It appeared in evidence that St. Augustine's church, situated in Fourth street, between Race and Vine, and a house situated on the back part of the same lot, and fronting on Crown street, together with much furniture, and other personal property in the church and house, had been destroyed by a mob on the night of the 8th of May, 1844.

A number of witnesses were called on the part of the

plaintiffs, to show the destruction by the mob, the value of the church and house, as well as that of their contents, which consisted principally of an organ, and other property in the church, and a theological library, furniture, &c., in the house.

The defence attempted to show, that the property was greatly over-valued, and that the plaintiffs had such knowledge of the intended attack, as made it necessary to a recovery, that they should give notice to the sheriff of the county, or the alderman or constable of the ward in which the property was situated, which had not been done.

They called a witness to prove, that on the afternoon of the 8th May, 1844, the keys of the church and house had been placed, with all the property claimed for, in the possession of John M. Scott, Esq., Mayor of Philadelphia. But it being objected that it was not shown that this was done by either of the corporators, the evidence was rejected.

Much other evidence was offered which was rejected by the learned judge, and the question was thus narrowed to the amount of damages, and the technical construction of the act of assembly.

The jury were addressed by *Stokes*, *Williams*, and *Meredith*, for the plaintiffs; and by *Kneass*, and *H. M. Phillips*, for the defendants.

Rogers, J.—Gentlemen of the jury,—The question before you is one almost exclusively of fact; it is, therefore, one for you, not for me to determine. Before delivering the case to you, however, it will be necessary for me to make a few remarks. This is an action on the case brought for the purpose of recovering compensation for damages done to the plaintiffs' property, by a lawless mob, during the month of May, 1844.

The action has been brought under an act of assembly passed in the year 1841. Other acts, on the subject of mobs, had existed previously to this, but may be considered

as having been repealed by it. Independently of the act of 1841, no right of action exists against the county. It provides, that when buildings or other property within the county of Philadelphia shall be destroyed by a riot or violence, the persons injured may bring suit against the county, for the injury they have sustained. [The learned judge here stated the provisions of the act of assembly.]

It has been in evidence, that the plaintiffs' property was destroyed, both real and personal; the defendants have admitted the destruction of the real, but have made various objections to being held responsible for the personal property. It has been said, that although the articles specified as having been destroyed, may have been in the house, it is not certain that they all belonged to plaintiffs, and that the county may, at a future day, be compelled to pay for some of them again. For all the purposes of this suit, the plaintiffs were the owners; they were in possession; and possession of personal property is evidence of ownership, and in the absence of contrary evidence, is to be held conclusive. This contradictory proof must come from the other side. No attempt has been made to show that the plaintiffs were guilty of any improper or illegal conduct, and the defendants have failed to prove any knowledge on the part of the plaintiffs; they, therefore, have a clear right to maintain this suit, and to recover damages against the county.

The act of assembly uses the expression, "persons." I cannot instruct you, as I have been requested, that persons does not mean corporations; it does bear that interpretation, and has been so construed by the supreme court of this state, as well as elsewhere. There is nothing then in the way of the plaintiffs' recovery, the only question is as to the amount of the damages.

The act of assembly has been carefully drawn, and is wise, just, and beneficial in its character. It is just, because it is the duty of the county to protect its citizens against lawless violence, and if it does not do this, to make

reparation for the injury which they may sustain from such violence. If the act is always rigidly enforced when violated, the effect will be found highly beneficial. If lawless individuals are made to understand that the result of their violence will recoil upon themselves, they will pause in their career. The plaintiffs should have ample compensation for the injury they have sustained from the riot of May, 1844.

If this action were against the rioters and not against the county, I would instruct you to give exemplary damages; these, however, you cannot give against the county, but damages, to the full extent of the injury, you should give. It is reasonable and proper, that allowance should be made for any seeming defect in the plaintiffs' evidence, caused by the violence of the mob. The law does not require the plaintiffs to prove every article destroyed, you will be justified, therefore, in attending to the general estimate of the plaintiffs' damages. It is a matter to be considered, from necessity, in mass, and not in detail. A classification has been made of the different kinds of property lost by the plaintiffs. 1st. The church. 2d. The house in Crown street. 3d. The library. 4th. The furniture and fixtures of the house in Crown street. 5th. The furniture of the church. 6th. The organ. [His honour then reviewed the testimony which had been given under each of these heads, and charged the jury that the plaintiffs had fully made out their claim.]

The only matter remaining, is as to the allowance of interest. In a case like this against the county, I have said exemplary or vindictive damages cannot be given. Whatever is allowed by you over the amount claimed, will be regarded, not as vindictive damages, therefore, but as compensation.

I do not instruct you to give interest; you certainly may do so in the way of compensation, and I think you should do so, but this I advise, I do not instruct you. Unless

such a course is adopted in similar cases, trials will always be postponed, and injustice done. Fifty thousand dollars paid to the plaintiffs now, will not be equal to the same amount, if it had been paid years ago: the accruing interest is lost. As an act of justice, then, reparation should be made for this loss, and it is your duty to repair, as far as you can, the mischief done by a lawless mob.

The proper measure of damages, then, is the full value of the property of the plaintiffs, destroyed in May, 1844, with an amount equal to interest added; calculated either from that time, or from the commencement of the suit in May, 1845. I would prefer that you should have been permitted to assess this amount as interest, separately from the amount of the value of the property destroyed, so that the supreme court might say, whether interest can be allowed; but this course is objected to by the defence, and therefore cannot be followed. I leave the case with you.

The jury gave a verdict for $47,433 88.*

* A municipal corporation is included within the term "person or persons," authorized by the act of 31st May, 1841, to bring suit against the county of Philadelphia, for injury to its property by a mob. *Commissioners of Kensington v. The County of Philadelphia*, 1 Harris 76. By the act of 20th March, 1849, the provisions of the act of 1841 are extended to the county of Allegheny. *Pamph. p.* 184.

St. Michael's Church *v.* The County.

[DECEMBER, 1847.]

The words *person* or *persons*, as used in the act of assembly of May 31, 1841, include, as well corporations for religious purposes, as individuals.

Upon knowledge of an intention to attack or destroy his property, it is the duty of the plaintiff or of his agent duly constituted for that purpose, if sufficient time intervenes, to give notice to an officer designated in the act; and such notice must be in writing. Wherever notice is required under a statute, written notice is to be understood.

Mere apprehension of an attack is not sufficient to deprive the plaintiff of the benefits of the statute; knowledge of a contemplated attack must be brought home to him, and it must also be proved, that a sufficient time elapsed to permit notice to be given to the proper officer.

The measure of damages is the value of the property destroyed, to which it would be proper for the jury to add interest from the time of destruction.

THIS was an action brought against the county under the act of assembly of the 31st May, 1841, to recover damages for the destruction of a church and dwelling house, with the property therein, by a mob, on the afternoon of May the 8th, 1844.

The evidence showed, that during the great riots which prevailed in the district of Kensington in the early part of May, 1844, the sheriff had called out the military to protect the lives and property of the citizens; that on the morning of the 8th of May, a battalion had been posted in St. Michael's church, near the corner of Jefferson and Second streets, to protect that church and the adjacent parsonage; that in the course of the day the military were ordered to another point by the military superior of the officer in command, and that in about half an hour afterwards the church and parsonage were burnt.

Evidence was also given to show that the sheriff had been verbally notified of the danger of the church, and had been called on to protect it from violence, but it was not

shown that the person by whom the notice had been given was either one of the trustees, or an agent of the trustees duly constituted for that purpose.

The defendants offered to prove, that on Monday, the 6th of May, a number of persons, including three of the trustees, were in the church with fire-arms; that during that evening a portion of them marched down Second street, more than a square from the church, and fired upon some people there, killing two of them; that this illegal and improper conduct was the cause of the property being destroyed by the mob, if it was so destroyed, of which defendants alleged there was no proof. This offer was rejected by the court on the ground, that even if the fact were that some of the trustees constituted a part of such a body of men, their illegal acts would not be permitted to compromise the interests of the other corporators who were absent.

The defendants then offered to prove, that on Tuesday and Wednesday, anterior to the burning of the church, notice was given to two of the trustees, or they had knowledge of an intention to destroy the property. This evidence was objected to, and excluded, because the knowledge was not had by, or notice given to, the corporation or the trustees, in their corporate capacity.

The plaintiffs claimed $29,631 07 with interest, and offered evidence to prove that sum to be the value of the church and parsonage with their contents, when they were destroyed.

The jury were addressed by *Porter*, *Guillou*, and *Meredith*, for the plaintiffs; and by *Kneass*, and *H. M. Phillips*, for the defendants.

The defendants' counsel submitted the following points, on which they requested the court to instruct the jury. 1. A corporation such as the plaintiffs, is not within the provisions of the 7th section of the act of May 31, 1841, and therefore they cannot recover. 2. If upon knowledge

had, of an intention to attack or destroy the property of the plaintiffs, or to collect a mob for such purpose, they did not give notice to the sheriff of the county, or to the alderman, or constable of the ward, sufficient time intervening to enable them to do so, the plaintiffs cannot recover. 3. Such notice must have been given by one of the plaintiffs, or an agent of the plaintiffs, duly authorized for that purpose. 4. The notice must have been explicit in stating the property threatened, and in giving notice to the proper officer of such threat or intention to attack or destroy. 5. There is no evidence that any one of the plaintiffs or other person by their direction and authority, gave notice to either of the officers named in the law. 6. That no interest is recoverable, and if recoverable, it can be recovered only from the time of bringing the suit.

Rogers, J.—This is an action to recover compensation for the destruction of real and personal property belonging to the plaintiffs, by a mob, on the 8th of May, 1844.

The suit is brought under the provisions of the act of assembly of the 31st May, 1841. By that act it is provided, that when any dwelling house, or other buildings, or other property, real or personal, is destroyed within the county of Philadelphia in consequence of any mob or riot, it shall be lawful for the person or persons interested and owning the property to bring suit against the county for the recovery of such damages as he sustains by its destruction.

In the second section it is provided, that no person shall be entitled to the benefit of this act if it shall appear that the destruction of the property was caused by his own illegal and improper conduct, nor unless it be made to appear that he, upon the knowledge of the intention, or attempt to destroy his property, or to collect a mob for that purpose, and sufficient time intervening, gave notice thereof to a constable, alderman or justice of the peace, or to the sheriff of the county.

[St. Michael's Church v. The County.]

The next section gives the injured party the option to bring suit against the rioters, or the county, providing, however, that the injured party shall not recover double compensation. The last section enables the commissioners of the county to recover from the rioters, or persons aiding or assisting them, all damages, costs and expenses incurred by the county.

The first question which the jury have to decide, and it is a question of fact, is, whether the plaintiffs' property was destroyed. On this point you will have little difficulty, as the proof was full and ample for that purpose. [His honour here recapitulated the testimony, going to show conclusively, the existence of a mob, and the destruction of the church and buildings by fire.] That the property was destroyed either by the mob, or the plaintiffs themselves is certain. It is not probable that the plaintiffs would burn their own property. But conceding that the plaintiffs' property was destroyed by a mob, the defendants still contend, that this suit cannot be sustained.

1st. Because a corporation, such as the plaintiffs, is not within the provisions of the 7th section of the act of May 31, 1841. On this point the court instruct you, that although the words of the act are person or persons, yet corporations such as this, as has been repeatedly held, are included and entitled to its benefits.

Several other points have been submitted to the court, on which I will proceed to instruct you.

If, upon knowledge had of an intention to attack or destroy the property of the plaintiffs, or to collect a mob for such purpose, they did not give notice to the sheriff of the county, or the alderman or constable of the ward, sufficient time intervening to enable them so to do, the plaintiffs cannot recover. This notice must be given by one of the plaintiffs, or by an agent of the plaintiffs duly authorized for such purpose.

The notice must be explicit in designating the property threatened, and in giving information to the proper officer

of such threat or intention to attack or destroy. There was no evidence whatever, that any one of the plaintiffs, or other person by their direction and authority, gave notice to either of the officers named in the law. The court say further, and if it be necessary, they will instruct you, the notice should have been given in writing. That when a statute directs notice to be given, the rule is, it is to be given in writing, in which respect it differs from the common law.

These points the jury will therefore consider as ruled in favour of the defendant. But the question recurs, had the plaintiffs knowledge of an intention or attempt to destroy their property: the court instructs you, that there is no evidence of any such knowledge. Even admitting that of which proof has been given, that three of the trustees were in the church on the Monday preceding the destruction of the property, that was not sufficient proof of knowledge within the act. The proof was of an apprehension merely, and not of knowledge that it was intended to attack or destroy the property. The defendant, in the opinion of the court, has failed in showing any bar to the action, and if you believe that the plaintiffs' property was destroyed by a mob, all that you are called upon to do, is to estimate the amount of damages the plaintiffs have sustained.

The act of assembly is most carefully drawn. It is intended to protect, as far as possible, the rights of all, and is a just and salutary statute. It is just, because it is the duty of the community in which we live to protect the property of every citizen against lawless violence, and if unable or unwilling to do so, they must be content to remunerate the injured party to the extent of the loss he may sustain. If lawless individuals are taught that the effect of their vengeance falls on themselves, and not on the objects of their resentment, they may be careful how they give way to their loose and revengeful passions.

If these views are correct, it is but an act of justice to the county, to give the plaintiffs full and ample compensa-

tion for all the injury they have sustained, in the disgraceful riots which occurred on the 8th of May. [The court then classed the articles of property destroyed, and directed the jury to consider each separately in coming to their conclusion, and referring to the testimony of Messrs. Caldwell and Smith, witnesses called to prove the value of the property destroyed, told the jury that it was entitled to great weight.]

The measure of the damages is the value of the property destroyed, to be ascertained as you best can from the evidence. To this you may add, the court do not say you must add, although in their opinion you ought to do so, interest by way of damages from the 8th of May, 1844, when the property was destroyed, or at any rate from the commencement of the suit till the rendition of the verdict. You will therefore first determine the value of the property destroyed, and if you agree with the court, you will add the interest, and find a verdict for the aggregate amount.

The jury found a verdict for the plaintiff for $27,090 02.*

* In a suit against the county of Philadelphia, under the act of 31st May, 1841, for compensation for damages done by a mob, to a school house owned by plaintiff, evidence of improper conduct by men assembled within a church, of which the plaintiff was pastor, is properly excluded as irrelevant, it being shown that he was absent from the city at the time. In order to exclude a person from the remedy provided by the act, it must appear that the destruction of the property was caused by his illegal or improper conduct. He is not involved in the misconduct of others, unless he be in some way connected with it. It is not necessary that notice under the act should be given, when the owner has no knowledge of the intended attack; verbal notice "that it was expected the church would be attacked, and if so, the school house would go too," is sufficient in case of the destruction of the school house. The act includes an accidental destruction by fire, communicated from a building fired by a mob. And in such action, an omission to set out in the *narr.* the ward in which the property is situated, is cured by verdict. *Donoghue* v. *The County of Philadelphia*, 2 Barr 230. And on the trial of such an action the plaintiff may prove his ownership and the value of wearing apparel destroyed; but he is incompetent to prove the destruction of household furniture, &c. *The County* v. *Leidy*, 10 Barr 45.

See other cases arising out of the riots of 1844, reported in 7 W. & S. 108; 3 Penn. L. J. 394, 442; 4 Penn. L. J. 29, 150, 257; 1 Harris 76.

Smethurst et al. *v.* Thurston et al.

[FEBRUARY 16, 1848.]

The settlement, by one who is insolvent, of his wife's fortune in trustees, for her separate use, cannot be impeached by creditors of the husband.

Until a husband reduces his wife's choses in action into possession, his creditors cannot touch them: and if he declines to do so they have no right to object.

BILL IN EQUITY—presented by Richard Smethurst, William King and Edward W. David, trustees of the estate of Charles Connor Barrington, against Charles M. Thurston, the said Charles Connor Barrington and Rachel H. Barrington, his wife, praying that a bond and mortgage given by C. C. Barrington to C. M. Thurston, might be declared to be void, and delivered up to be cancelled.

It appeared that, in December, 1843, C. C. Barrington married Rachel H. Thurston, a daughter of Charles M. Thurston, of the city of New York. In 1844, Mr. Thurston died intestate, leaving a large estate, principally personal. The proportion to which Mrs. Barrington was entitled amounted to about $20,000. A correspondence took place between C. C. Barrington, who was engaged in business in Philadelphia, and his wife's family in New York, in which it was agreed that $10,000 of Mrs. Barrington's portion of her father's estate should be secured to her separate use. As a part of this arrangement, Barrington purchased a house in Collonade row, and gave a mortgage upon it, (together with a bond and warrant of attorney,) to Charles M. Thurston, of New York, his wife's brother, for $6,000. This sum was made up of $5,000 remitted from New York, by Thurston, as part of his sister's share, for the purpose of making the purchase, and $1,000, part of a larger sum, in which Barrington had become indebted

to his father-in-law. A declaration of trust was made and executed, on the same day, (15th May, 1845) by C. M. Thurston, that the bond and mortgage were held by him for the sole use of Mrs. Barrington.

On the 21st of November, 1845, Henry Pratt M'Kean and others, sued out of the court of common pleas of Philadelphia county, a writ of domestic attachment against C. C. Barrington, when the complainants were appointed trustees by the court, and filed this bill to set aside the settlement on Mrs. Barrington, alleging that it was fraudulent and void, as against the creditors. It was shown that Barrington was insolvent at the time of the settlement.

Gerhard, for complainants.
P. P. Morris and *Tyson*, contra.

Bell, J.—The simple question is, whether the mortgage and accompanying declaration of trust in favour of Mrs. Barrington, are good against the husband's creditors. I think the case admits of no doubt. The father of Mrs. Barrington having died shortly after her intermarriage with C. C. Barrington, leaving a large estate, it was agreed between Barrington and his wife's relatives, that $10,000 of her fortune should be settled upon the wife. Her fortune seems to have amounted to $20,000. This was effected by the purchase of a house in this city, with funds advanced by C. M. Thurston, as the executor of his father's estate, including $1,000, part of a debt due the estate from Barrington, with the express understanding they were to be so applied; and a mortgage was given on the house for the use of Mrs. Barrington. Now what was there to prevent this? Not the insolvency of Barrington at the time, for this could only come into question when there was an attempt to settle property of his own upon his wife. But what was, in fact, settled were *her* choses in action. Now the husband, in making a settlement, has done nothing

more than equity would have compelled him to do, had he sought its aid to acquire possession of the fund. In *Rees* v. *Waters*, 9 Watts 90, it is said, a suit to protect the equity of the wife may be instituted by her against a creditor of the husband: and see *Kenny* v. *Udall*, 5 Johns. Ch. R. 464; *Haviland* v. *Myers*, 6 Johns. Ch. R. 25.*

But it is asserted that the sum settled on the wife is too large. I do not think so. No settlement is extravagant which is not more than sufficient for the support of the wife; *Wickes* v. *Clarke*, 8 Paige 161. In that case there was a settlement of the whole of the wife's property, the husband being insolvent; and the same thing is said in our case of *Rees* v. *Waters*, 9 Watts 90. Here the wife's property was $20,000—one-half, yielding an income of $600, is not too much.

But there is another ground upon which, if necessary, I think this transaction might be supported. The distributive share of the father's estate was a chose in action of the wife; *Wildman* v. *Wildman*, 9 Ves. 174; *Garforth* v. *Bradley*, 2 Ves. Sen. 675; 4 R. 182; and it is certain that until the husband reduces such choses into possession, his creditors cannot touch them. If he declines to do so, and prefers the property to remain in his wife, the creditors have no right to object; *Dennison* v. *Nigh*, 2 Watts 90; *Parsons* v. *Parsons*, 9 N. H. 321. But it is not every receipt of the husband that will transfer the property to him. Whether, in the exercise of his marital right, he *intends* to vest the property in himself, may be still inquired into. Though the presumption is so, *primâ facie*, it may be repelled by circumstances; *Wall* v. *Tomlinson*, 16 Ves. 414. As in *Hinds' Estate*, 5 Wh. 138, where the wife's bank stock was transferred in the name of the husband, but he gave a refunding bond to the executor, it was held not to be vested in him. So where the husband acknowledged to have re-

* See 1 Am. Leading Cases, 74—76.

ceived it as a loan; *Gray's Estate*, 1 Barr 327. So, the receipt of the wife's money, by the husband, for the purpose of investing it in real estate, for her benefit, will not so vest it in the husband as to entitle his creditors to attach it for the husband's debts; *Timbers* v. *Katz*, 6 W. & S. 290. Now what more did the husband do in this case? The fund was received for a special purpose, and if it were necessary, it might be held that it never vested in him. This remark is equally applicable to the $1,000 debt due from him to the estate.

Wherefore, it is ordered, adjudged and decreed, that, the deed of mortgage executed by Charles Connor Barrington to Charles M. Thurston, and the declaration of trust made by the latter, in favour of Rachel H. Barrington, being a good and valid settlement at law and in equity, the bill be dismissed with costs.*

* Since the decision in the text, the act of 11th April, 1848, has provided that "every species and description of property, whether consisting of real, personal or mixed, which may be owned by, or belong to, any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman, during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used and enjoyed by such married woman, as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband." (*Pamph. p.* 536.) Since the passage of this act, a married woman must be considered a *feme sole* in regard to any estate of whatever name or sort, owned by her before marriage, or which shall accrue to her during coverture by will, descent, deed of conveyance, or otherwise. The act works a radical and thorough change in the condition of a *feme covert*. She may dispose of her separate estate by will or otherwise, as a *feme sole*. Her property is hereafter exempted from levy and execution for the debts or liabilities of her husband, except in certain specified cases; and she cannot be deprived of it, either by her husband or any other person, without her express consent; *Cummings' Appeal*, 1 Jones 272; *Goodyear* v. *Rumbaugh*, 1 Harris 480. But this act had no retroactive effect, so as to interfere with rights vested in the husband or his creditors at the time of its passage; *Lefever* v. *Witmer*, 10 Barr 505. To remedy this last decision, however, the act of 22d April, 1850, appears to have been passed, which provides that the true intent and meaning of the act of 1848 is, that the real estate of any married woman shall not be subject to execution for any debt against her husband, on account of

Charles *v.* Abell.

[FEBRUARY 26, 1848.]

A discharge on *habeas corpus* puts an end to a criminal prosecution, so as to enable the defendant therein to maintain an action for malicious prosecution.

ACTION on the case, for *malicious prosecution*. On a motion to discharge the defendant on common bail, it appeared that the plaintiff, who was defendant in the criminal proceeding, had been discharged on *habeas corpus*, which, it was argued, was not such a determination of the prosecution as would enable the plaintiff to maintain this action.

BELL, J.—It must be acknowledged that the law on this subject has undergone many alterations in modern times. It seems to be now agreed that if a grand jury ignore the bill, it is sufficient to maintain the action. But this rule has been still further modified, and it is settled that if a party is brought before an examining magistrate and discharged, though the proceeding might be again renewed, still, in point of law, that prosecution is ended, and the party may maintain the action for malicious prosecution. There is a precedent of a declaration in Chitty's Pleadings, in an action brought under such circumstances. There is no difference in point of principle and practice between a discharge by a committing magistrate, and a discharge by a judge who examines the case upon *habeas corpus*. It as

any interest he may have therein as tenant by the curtesy; but the same shall be exempt from levy and sale for such debt, during the life of the wife. (*Pamph. p.* 553.) And it was ruled, in *Gamble's Estate*, that if the wife dies before the husband, intestate, seized of an estate of inheritance, he will be entitled to enjoy the same during his life, in the same manner as a tenant by the curtesy consummate at common law. But during the life of the wife, he can neither sell, lease, charge or in any way affect her real estate, having no present interest therein, nor any future interest, except as distributee under the intestate law. 1 Pars. Eq. Cases, 489.

effectually puts an end to the prosecution, as if the defendant were discharged by a magistrate—although a new charge may be afterwards made. The motion to discharge on common bail is therefore refused.*

M'Laughlin *v.* M'Makin.

[April 11, 1848.]

It is not libellous to publish the proceedings of a court of justice, without a malicious intent to injure the character of the plaintiff.

Action on the case for libel. The publication was in the "Saturday Courier," and noticed the fact that the plaintiff had been stricken from the roll of attorneys in the court of criminal sessions.

M'Laughlin, in propriâ personâ.
J. T. S. Sullivan, for defendant.

Burnside, J.—Charged the jury, that the paper in which the publication was made appeared to be a literary and general newspaper. The question was whether this publi-

* In the district court for the city and county of Philadelphia, the practice is directly contrary to the ruling of Judge Bell, in the foregoing case; it is there held, that a discharge on *habeas corpus* does not end the prosecution: it only relieves the defendant from imprisonment, but he may still be indicted on the original complaint. *Schopffel* v. *Kleinz*, Nov. 11, 1848, MSS. And this view of the law appears likewise to be held by the court of common pleas of Philadelphia county: in *Commonwealth* v. *Ridgway*, 2 Ash 258, Judge King said:—"I rejoice that our judgment" (discharging the defendant on *habeas corpus*) "is not conclusive of the subject: the sole effect of this decision is, that, in the present state of the evidence, we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer to submit the case to the grand jury: that respectable body are entirely independent of us; they may form their own view of the prosecutor's case, and may, if their judgment so indicates, place the defendant on his trial." See, also, the remarks of Judge Randall, in the same case, 2 Ash 256; and 1 Am. Lead. Cases 231.

cation was made with a malicious intent to injure the character of the plaintiff. If it was a mere case of a publication of the proceedings of the court, without malice, the plaintiff could not recover. In this country, the proceedings of courts of justice are open to criticism and examination. The proceedings of the courts are matters fit for public information, and may be published by every printer, if he is not actuated by a malicious intent. It was a question for the jury in this case to decide whether any malice had been proved against the defendant. Here, the press is free: it has been called the bulwark of freedom, and where it is not licentious, it should be protected.

Verdict for defendant.*

Hummell *v.* Wester.

[March 7, 1849.]

When, in a city, a horse attached to a carriage is found running on the sidewalk, to the injury of citizens, the law will presume negligence on the part of the owner; and he is liable in such case for the carelessness or neglect of his servant.

This was an action to recover damages for injuries sustained by the plaintiff, in consequence of the negligence of a servant of the defendant. In September, 1848, the plaintiff was walking along the footway, near the Frankford road and Norris street, in Kensington, when he was run against by a horse belonging to the defendant, which was attached to a wagon, and driven by a boy in his employ-

* It has been recently decided, in New York, that the publication of *ex parte* preliminary proceedings before a police magistrate, is not privileged: the justification for such publication must be found, not in privilege, but in the truth of the statement published. *Stanley* v. *Webb*, 2 U. S. Law Mag. 396. And see 1 Am. Lead. Cases 187, where the authorities have been carefully collated, and the subject is discussed with great learning and ability.

ment. The plaintiff was knocked down and severely injured, so as to be confined to his house for several weeks. For these injuries, the present action was brought.

The defence was, that the horse was gentle and tractable in disposition, was well broken, and could be easily managed; that on this occasion he was frightened, in consequence of being struck by a whip by the driver of an omnibus, which was passing along the street in which the horse and wagon were standing; in consequence of which the animal ran away, became perfectly unmanageable, and could not be checked by the boy who had charge of the wagon: during his course the plaintiff was injured. The defendant also alleged that the horse was one which could be left standing any where, without the necessity of hitching. It was contended, for the plaintiff, that this very fact went to establish negligence.

BURNSIDE, J.—Charged the jury as follows: 1. That the case was one in which the plaintiff was entitled to a just and proper remuneration for the injury received, though not to vindictive damages. 2. That when, in a city, a horse attached to a wagon or carriage is found running on the sidewalk, to the injury of citizens, the law will presume negligence on the part of the owner, and it lies upon him to show that there was no fault on his part. The presumption is, that there was negligence, unless the contrary is proved. The defendant is liable for the carelessness or neglect of his servant.*

* The different character of the responsibility incurred by the owners of the various kinds of domestic animals was clearly stated in the opinion of Lord Chief Justice HOLT, in *Mason* v. *Keeling*, 12 Mod. 335, who there says, —"The difference is, between things in which a party has a valuable property," (at common law) "for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality." And, accordingly, in *Dolph* v. *Ferris*, 7 W. & S. 369, KENNEDY, J., held that "on account of the natural propensity of horses, cows and sheep to rove, the owner is bound, at all hazards, to confine them on his own

Wetherill *v.* Mecke.

[March 20, 1850.]

A devise of real estate, in trust, one-third part thereof to the use of my daughter S. L. M., and her heirs; one-third part thereof to the use of R. L., wife of my son J. B. L., and her heirs; and the other third part to the use of E. L., wife of my son J. L., and her heirs; the rents, issues and profits to be paid to them according to their respective portions of the same; and their receipts to be sufficient acquittances to the trustee: with power to the *cestuis que trust*, by writing, with the consent of the trustee, to revoke the trust; and also, with his consent, to make sale of the premises for the purpose of investing the proceeds in any other kind of property more beneficial or productive to them; gives to the devisees separate estates for their own use.

One of the devisees being a *feme sole* at the death of the testatrix, the use was executed by the statute, and she had power to convey her interest in the premises by deed.

A conveyance by another of the devisees, who was a *feme covert*, and her husband, (with the assent of the trustee,) in exercise of the power vested in her by the will, to her son, in consideration of one dollar, and of other valuable considerations, is not a valid execution of the power, and passes no title to the property.

A *feme covert* has no power over her separate estate but what is given to her by the conveyance creating it; and then only, in the manner and form and for the objects therein prescribed.

A *feme covert*, being compellable to make partition, may become party to an amicable action of partition; and so also may minors, by their guardian.

A court of equity will not compel a purchaser to accept a *doubtful* title.

In Equity. Bill for specific performance. The bill stated that the complainant, being the owner of a house and lot of ground in the city of Philadelphia, on the 23d of June,

land, and if they escape and do any mischief on the land of another, which they are naturally inclined to commit, the owner is liable to an action of trespass, though he had no notice in fact of such propensity." And on the same principle, it was ruled, in *Goodman* v. *Gay*, that a person who allows his horse to go at large in the streets of a populous city, is responsible for any injury done by him, and that in such action it is not necessary to aver the defendant's knowledge of the animal's vicious propensities. Supreme Court, February 10, 1851. And see 1 Ch. Pl. 82, 83; 10 S. & R. 395; 2 Saund. Pl. & Ev. 864; 7 Barr 254; 1 Miles 39.

1849, sold the same to the respondent for $15,000; and prayed that the respondent might be compelled to perform his agreement, and pay the purchase money to the complainant, with interest, on the execution of a proper conveyance.

The answer admitted the agreement as set forth in the bill, except that it was expressly made a condition of the said agreement that the title to the premises should be undoubted. That respondent had always been willing to comply with the terms of his agreement; but that complainant could not make him an undoubted or marketable title to the premises, wherefore he was not entitled to a specific performance.

That the complainant derived his title from one Dorothy Large, who was formerly the owner of the premises. That the said Dorothy Large, by her will, dated the 3d November, 1827, and proved on the 6th December, 1832, devised her real estate, including the said premises, to James Large Mifflin and his heirs, in trust, in the words following, to wit:

"In trust, nevertheless, for the uses and purposes following, that is to say, one-third part thereof to the use of my daughter, Sarah Large Mifflin, her heirs, executors and administrators; one-third part thereof to the use of Rebecca Large, the wife of my son, John Baldwin Large, her heirs, executors and administrators; and the other one-third part to the use of Elizabeth Large, the wife of my son, James Large, her heirs, executors and administrators: and it is my will and desire that the shares and portions of the estate, so as aforesaid given, devised and bequeathed to the said James Large Mifflin, shall be held and retained by him, the said James Large Mifflin, his heirs, executors and administrators, in trust as aforesaid; and that the rents, issues and profits thereof be paid to the said Sarah L. Mifflin, Rebecca Large and Elizabeth Large, according to their and each of their respective third parts or portions of the same; and the receipts for the same, to be given by

the said Sarah L. Mifflin, the said Rebecca Large, and the said Elizabeth Large, from time to time, in writing, shall be good and sufficient vouchers and acquittances to the said James Large Mifflin, his executors and administrators, for the payment of the rents, issues and profits aforesaid. *Provided*, nevertheless, that it shall be competent for the said Sarah L. Mifflin, Rebecca Large and Elizabeth Large, by writing under their hands, with the assent and concurrence of the said James Large Mifflin, his heirs, executors and administrators, by writing under his or their hands, to dissolve the aforesaid trust; and in such case, the said residue of the said real, personal and mixed estate, so given, devised and bequeathed as aforesaid, shall be and remain to the said Sarah L. Mifflin, Rebecca Large and Elizabeth Large, and their and each of their heirs, in their own rights, and according to the purparts before described, in fee-simple for ever. And it is my will also, that in case the legatees aforesaid, with the consent and concurrence of the trustees aforesaid, should desire, at any time, to make sale or disposition of the aforesaid estate, or any part or parts thereof, for the purpose of investing the proceeds in any other kind of estate or property, more beneficial or productive to them, it shall be competent for them, at any time, so to do, by agreement in writing, under their hands, or the hands of their legal representatives respectively."

That Elizabeth Large, one of the devisees, died intestate, after the death of Dorothy Large, leaving a husband, James Large, and four children, to wit, Thomas P., Mary, Anne P., and Sally M. Large, surviving, to whom her share descended.

That afterwards, on the 20th June, 1833, by indenture between the said Sarah L. Mifflin, of the first part, the said James Large Mifflin, of the second part, the said Rebecca Large, wife of John B. Large, of the third part, and the said Thomas P., Mary, Anne P., and Sally M. Large, of

the fourth part; reciting the will of the said Dorothy Large, the death, intestate, of the said Elizabeth Large, leaving the said four children, and an arrangement for the division of the property, by which it was agreed, by the said first party, to convey to the said third and fourth parties equally, the third of the real estate therein devised to her and her heirs, and that the said trustee concurred in such conveyance, by becoming a party thereto; the said Sarah L. Mifflin, in consideration of the premises, and other valuable considerations, and of one dollar to her paid by and on behalf of the third and fourth parties thereto, did convey to the said third and fourth parties thereto, and their heirs, all and singular the lands, messuages, tenements and hereditaments, devised unto the said Sarah L. Mifflin, by her mother, Dorothy Large, by her last will and testament, to hold "one moiety thereof unto the said Rebecca Large and her heirs, and the other moiety thereof unto Thomas P. Large, Mary Large, Anne P. Large, and Sally M. Large, as they now respectively hold their own shares and proportions of the real estate devised under the said will, with the like power and incidents, and as if the property now conveyed had been devised by the said will, in trust for the same uses that the other two-thirds had been devised upon and subject to."

That on the 21st November, 1833, an amicable action of partition was entered in the district court for the city and county of Philadelphia, wherein the said Thomas P. Large, Mary Large, Anne P. Large and Sally M. Large, minors, by their guardian, James Large, were plaintiffs; and the said John B. Large and Rebecca his wife, in her right, were defendants.

By this agreement, signed by the said James Large, guardian, and John B. Large and Rebecca Large, it was agreed that the said action be entered as if a summons had issued, in partition, for the parting and dividing the several hereditaments therein set forth, including, *inter alia*, a lot

of ground, of which the premises in question are a part; and that judgment be entered against them, that partition be made between them and the said plaintiffs, and that the same be parted and divided into two equal moieties, one moiety thereof, according to value, unto the said plaintiffs, and the other moiety thereof, according to value, unto the said Rebecca Large, to be held by the said parties in severalty. Thereupon, a writ *de partitione facienda* was issued, to which the sheriff made return that, on the 29th November, 1833, he, the said sheriff, and a jury summoned by him under the said writ, had parted and divided the premises therein described into two equal parts, and allotted, *inter alia*, a lot of ground, of which the premises mentioned in the bill are a part, to the said Rebecca Large, to be held by her in severalty; which return was confirmed by the court on the 10th December, 1841.

That, on the 16th April, 1835, by indenture of that date between the said James Large Mifflin, trustee, &c., under the will of Dorothy Large, deceased, of the first part, the said John B. Large and Rebecca his wife, in exercise of the power in her vested by said will, of the second part, and Robert H. Large, who is a son of the said John B. and Rebecca Large, of the third part; the said James L. Mifflin, John B. Large and Rebecca his wife, in consideration of the sum of one dollar, *and other valuable considerations*, did grant and convey to the said Robert H. Large, in fee, a lot of ground, including the premises in question.

The answer further stated, that the complainant derived his title to the premises from the said Robert H. Large, by sundry mesne conveyances; and that he could not make an undoubted nor a marketable title to him, because the conveyance from John B. Large and Rebecca his wife, to Robert H. Large, of the 16th April, 1835, was not a valid execution of the power of sale and disposition given to the said Rebecca, by the will of the said Dorothy Large: and that the said proceedings in partition were irregular and

defective, and do not conclude all parties interested in the premises.

Perkins, for complainant.
M'Call, for defendant.

The following opinion was delivered by

Bell, J.—No doubt the devisees named in the will of Dorothy Large took separate estates to their own use. But Sarah Large Mifflin (one of them) being a *feme sole*, this use was executed by the statute, and her conveyance of June, 1833, was therefore probably effective to convey her interest in the subject of that deed; more particularly, as the object seems to have been to effect a partition of the devised estate. *Lancaster* v. *Dolan*, 1 R. 246–7; 1 Saund. on Uses, 197. So, too, I think the agreement to enter into an amicable action of partition, between the minor children of Elizabeth Large, by their guardian, and John B. Large and Rebecca his wife, and the subsequent proceedings, resulting in a final judgment, may be supported, on the ground, that the minors and *feme covert*, Rebecca Large, being compellable to make partition of the trust property, their voluntary agreement to do so, or any step towards it, is valid, in the absence of any allegation of unfairness. Litt. § 257; Co. Litt. 171 *a;* Allnatt on Part. 21. And the *feme covert*, infants and *cestuis que trust* were, properly, made parties to the action. *Attorney Gen.* v. *Hamilton*, 1 Madd. 122; *Willing* v. *Brown*, 7 S. & R. 468; *Gratz* v. *Gratz*, 4 R. 411; Act of 1807; Miller on Part. 34; Allnatt 27, 104. But this partition left the land still subject to the trust, and the directions of the will by which it was created. Now, since *Lancaster* v. *Dolan*, 1 R. 248, it is the settled doctrine of this state that a wife, in respect of her separate estate, is deemed a *feme sole* only to the extent of the power given by the conveyance creating the estate. Instead of having an absolute right of disposition,

unless expressly restrained, (which seems to be the modern English doctrine) the converse of the proposition is true, viz. that a married woman has no power but what is expressly given. She cannot exercise an authority over the estate, so as to divert it from the defined object of the trust further than she is expressly empowered so to do, by the terms of the deed; and then only in the manner and form and for the objects prescribed by it. *Pullen* v. *Rianhard*, 1 Wh. 514; *Thomas* v. *Folwell*, 2 Wh. 16. So far was this doctrine carried in *Dorrance* v. *Scott*, 3 Wh. 309, that a power to a *feme covert* to sell and absolutely convey the estate, and to appropriate the proceeds to her own use, or to devise to whom she saw proper, and in default of a devise over to her right heirs, was not well executed by a confession of judgment to secure repayment of money borrowed. *Lyne's Executor* v. *Crouse*, 1 Barr 111, is another strong case: there, a *feme*, in contemplation of marriage, conveyed her estate in trust for the separate use of herself, her heirs and assigns for ever, and to be subject to her order alone: it was ruled, she had no power of disposition, having reserved none.

By the will of Dorothy Large, the *cestuis que trust* were empowered to revoke the trust declared, by writing executed by all of them, with the assent of the trustee. This has not been done. Failing this, they were empowered, with the consent of the trustee, to sell and dispose of the trust estate, "for the purpose of investing the proceeds in any other kind of estate or property more beneficial or productive to them;" and, perhaps, after partition made, this might have been done by one of them, in respect of the purpart assigned to her, and which, of course, she would continue to hold, in severalty, subject to the trust. But it is not apparent that the conveyance from Rebecca Large and her husband, to their son Robert H. Large, was for any such purpose. Nay, the consideration expressed, of one dollar, would seem to prove no purpose of again

purchasing with the purchase money was in view, or led to the conveyance to the son. I do not think this is helped by the allegation of "other valuable considerations," especially in the absence of any averment in the bill or answer, of such being the object of the sale. The defendant insists, that looking only to the muniments tendered him, the plaintiff cannot make a marketable title, inasmuch as the latter derives his interest in the premises under the deed to Robert H. Large, which was not a valid execution of the power, and therefore passed nothing. It strikes me there is soundness in this objection. At all events, I *doubt* the title tendered, and this is sufficient, for the present, to defeat the prayer for a specific performance.

The plaintiff's bill must be dismissed with costs.*

* A marketable title in equity, is one in which there is no doubt involved, either as to matter of law or fact; and such a title only will a purchaser be compelled to accept. This distinction between good and marketable titles seems peculiar to courts of equity, being unknown in courts of law, where the question is absolutely, *title*, good or bad. The equity doctrine seems to involve this result, that no title will be forced on a purchaser which is not so free from difficulty, as to law and fact, that on a resale, an unwilling purchaser shall be unable to raise any question which may appear to a judge, sitting in equity, *so doubtful*, that a title involving it ought not to be enforced. These doubts must, however, in the language of Lord Eldon, (in *Stapleton* v. *Scott*, 16 Ves. 272) be "considerable and rational," such as would and ought to induce a prudent man to pause and hesitate, in the acceptance of a title affected by them; not based on captious, frivolous and astute niceties, but such as produce real, *bonâ fide* hesitation in the mind of the chancellor. *Dalzell* v. *Crawford*, 2 Penn. L. J. 21, 22; S. C. 1 Pars. Eq. Cases, 37. And if the contract be vague and uncertain, a court of equity will not exercise its extraordinary jurisdiction, but leave the party to his legal remedy. *Parrish* v. *Koons*, 1 Pars. Eq. Cases, 80.

Hinchman *v.* Richie.

[April 9, 1849.]

Conspiracy consists in an *agreement* or common design to do an unlawful act; or to do a lawful act, for an unlawful end, though nothing be done in pursuance of it: it is then indictable; but is not the subject of a civil action, unless some act be done to give effect to the purposes of the conspirators, either of extortion or mischief.

When the fact of the combination of the individuals in the unlawful enterprise is shown, every act and declaration of each member of the confederacy, in pursuance of the original plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is original evidence against them.

It makes no difference at what time any one came into the conspiracy: every one who does enter into such a common design is, in law, a party to every act which had been previously done by any of the others in pursuance of it.

It is not a violation of the bill of rights to restrain an insane person of his liberty, without oath or affirmation.

In an action to recover damages for restraining one of his liberty, as a lunatic; the question for the jury is, whether the safety of the person himself, or that of his family, or friends, or neighbours, required that he should be restrained for a time, and whether such restraint is necessary for his restoration, or will be conducive thereto.

An action of *conspiracy*, for confining the plaintiff in a lunatic asylum, cannot be sustained if the defendants conscientiously believed that the plaintiff was deranged, and required for his recovery medical treatment under restraint.

Although the existence of a conspiracy to confine the plaintiff in a lunatic asylum be proved, yet neither the signing of a certificate of lunacy by a physician, nor the receiving and keeping of the plaintiff in the asylum, by the officers thereof, nor the serving as a juror on an inquest by which the plaintiff was found a lunatic, but which was afterwards set aside, will render either the physician, the officers of the asylum, or the members of the inquest, co-conspirators, unless they had knowledge of the existence of the conspiracy, and their several acts were corruptly done in furtherance thereof.

The suing out of a commission of lunacy is not actionable, unless it be done maliciously and without probable cause.

The finding of an inquisition of lunacy, in the absence of improper motives, is proof of probable cause.

[Hinchman v. Richie.]

The finding of an inquisition of lunacy may be impeached on the ground of fraud, and in such case, it will furnish no justification for the arrest and confinement of the party.

On granting a commission of lunacy, it is the duty of the court to make an order directing notice to be given to the party, or his near relations, who are not concerned in the application; and in the absence of any such order, an omission to give notice is not to be imputed as a fault to the persons suing out the commission.

Such relations or friends as counsel a finding against the alleged lunatic, are excluded from the list of persons competent to receive notice of the execution of the commission.—KRAUSE, P. J.

A second commission cannot be issued upon the original petition, where the inquisition and proceedings under the first commission are set aside. —KRAUSE, P. J.

THIS was an action on the case, in the nature of a writ of conspiracy, brought by Morgan Hinchman against Samuel S. Richie, Edward Richie, John M. Whitall, George M. Elkinton, John Lippincott, John D. Griscom, Anna W. Hinchman, John L. Kite, Elizabeth R. Shoemaker, Benjamin H. Warder, Philip Garrett, Joshua H. Worthington, Charles Evans, William Biddle and Thomas Wistar, Jr.

The first count in the declaration charged that the defendants conspired together to aggrieve and impoverish the plaintiff, *and get possession of his property*, and to cause him to be suspected and believed to be a person of unsound mind, and incapable of managing his business and governing himself, and to cause him to be arrested away from his home and confined in a lunatic asylum; that in pursuance of such conspiracy, one of the defendants, the said Kite, signed a false certificate, purporting that the plaintiff was insane; that when the plaintiff had come as usual to the city of Philadelphia, to bring the produce of his farm to market, and had disposed of the same, and was about to return to his home, another of the defendants, Samuel S. Richie, got a certain Jesse White to make an appointment with the plaintiff, to wait for him the next morning at the hotel where the plaintiff staid, under pretence of purchasing one of the plaintiff's houses; that on the following morning

[Hinchman v. Richie.]

John M. Whitall, George M. Elkinton, Edward Richie, John Lippincott, John D. Griscom and Samuel S. Richie, assembled at the hotel, and when the plaintiff came in from ordering his horses and wagon to be harnessed, two of the defendants, John M. Whitall and George M. Elkinton, falsely pretended that they wanted some private conversation with the plaintiff, and under such false pretence accompanied the plaintiff to his chamber; that Lippincott, Griscom and Edward Richie came into the chamber immediately afterwards, and told plaintiff they were going to take him to a lunatic asylum; that they compelled the plaintiff to go with them to the door of the hotel, where Samuel S. Richie had, in the mean time, brought out plaintiff's horse and wagon, into which they forced him, and carried him off to a lunatic asylum; that Garrett and Worthington received him at the asylum, and together with the said Warder, Kite, Evans, Shoemaker, Biddle, Anna W. Hinchman and Wistar, detained him therein for the space of six months. That afterwards Samuel S. Richie, Edward Richie, and Elizabeth R. Shoemaker, in pursuance of the conspiracy, took plaintiff's horses and wagon, went up to his dwelling and farm in Bucks county, took possession of his books and papers, examined them and took them away, and took possession of his farm, and carried off his stock, farming utensils, grain, crops, and furniture, and in conjunction with Wistar, converted much of it to their use. That Anna W. Hinchman, Biddle, Griscom, Elkinton, Shoemaker, and Samuel S. Richie, persuaded and procured Eliza W. Hinchman, plaintiff's mother, to sign a petition to the court of common pleas of Bucks county, to have a commission of lunacy issued, to be executed in the county of Philadelphia. That the defendants afterwards, in pursuance of the said conspiracy, falsely, maliciously and without probable cause, procured a commission of lunacy, on the petition of the said Eliza W. Hinchman, to be issued out of the court of common pleas of Bucks county, directed

to one John D. Michener, and proceeded to execute the same, at the asylum, where the plaintiff was confined, without allowing him the advice or presence of counsel, or of any of his friends; and did falsely, illegally, and corruptly, procure the said inquest to find him a lunatic, and that he had been so for eighteen months then last past, without lucid intervals; which inquisition the defendants, in pursuance of their conspiracy, corruptly withheld, and made no return thereof, until after they had sold and disposed of all his personal property. That afterwards the said inquisition and all the proceedings in the case were set aside by the court of common pleas of Bucks county, and the plaintiff was duly discharged of the premises. By means whereof he had been greatly injured in his credit and reputation, and had suffered great anxiety and pain of body and mind, and had been forced to expend large sums of money in defending himself and manifesting his sanity; and also plaintiff's property to the amount of five thousand dollars had been lost and destroyed, carried away and sacrificed, and he himself had been prevented from following and transacting his lawful and necessary business for the space of eighteen months.

The second count charged that the defendants conspired for the like purposes, and to secrete the plaintiff in said asylum, for the purpose of confining him from his friends, &c., and in pursuance of such conspiracy, caused and procured him to be confined and imprisoned, without any reasonable or justifiable cause whatever, and against his will, in the said asylum, for the space of six months, and took possession of his property, and converted and disposed of the same to their own use. And that they might have a reasonable pretence for keeping him in said asylum, they falsely and maliciously persuaded his mother to sign a petition to the court of common pleas of Bucks county, for a commission of lunacy against him, &c.

The third count charged a like conspiracy, and *to compel*

him to settle his property on his wife and children; and that in pursuance of such conspiracy, the defendants falsely and maliciously represented to his mother, that he was incapable of managing his business, and was squandering his estate, and ill treating his wife, and had better be taken to the asylum, &c. Also charged his arrest and imprisonment in the asylum, in pursuance of such conspiracy, without any legal or justifiable cause, &c.

The fourth count charged, that the plaintiff having been seized, when away from his home, by some of the defendants, and forcibly and against his will, taken to and confined in the asylum, the defendants conspired to keep him in confinement, *until he would consent to give up the management of his property, and settle the same on his wife and children*, and did forcibly and against his will keep him confined for the space of six months, &c.

The parties in this case were all members of the society of Friends. Most of the defendants were relatives either of the plaintiff or of his wife; to whom he was married in 1839, and with whom he resided in Philadelphia until the spring of 1844, when he removed to a farm in Bucks county, which he had lately purchased. During his residence in Philadelphia, the plaintiff was employed as a clerk in the bank of Penn Township. He lived on his farm until about the 7th of January, 1847, when he was taken to the Friends' lunatic asylum, near Frankford.

It was shown on the part of the plaintiff that his relatives, having come to the determination to confine him in a lunatic asylum, procured from Dr. John L. Kite, a physician, who had not seen him for four months, a certificate of his insanity. On the 5th of January, 1847, plaintiff geared up his horses and wagon and started for the city of Philadelphia, with a load of marketing, as he was in the habit of doing, regularly, once in every two weeks. When he left home, nothing unusual was observed in his behaviour; he gave directions to the persons in his employment, before

starting, as to their occupation, told them to take care of the cattle, and promised to return as soon as possible. He left behind him his wife and three children, one of whom died before he again met his family. Having disposed of his marketing, and made preparations for his return on the following morning, the plaintiff was visited by Jesse White, at his hotel in the city of Philadelphia, who spoke to him about a house which Hinchman had previously tried to dispose of, and left him after ascertaining that he would be at the hotel at eight o'clock the next day.

Jesse White called on plaintiff, on this occasion, at the request of Samuel S. Richie and George Dilks, (Richie's brother-in-law.) They said Hinchman was crazy, they wanted to take him to the asylum, and wished White to make an appointment with him in order to detain him in the city until the following day. White observed nothing like insanity about the plaintiff, but having made the appointment with him, went out and informed Edward Richie of it, the others having previously left.

On the following day, Samuel S. Richie, Edward Richie, John M. Whitall, George M. Elkinton, Dr. John D. Griscom, and John Lippincott, went to the tavern, and met the plaintiff. They told him they wanted to speak with him; they wanted him to go with them. Hinchman answered, that he had not time, but would take them into a private room and talk with them there. They went up stairs together, after which one of them came down, and told the bar-keeper not to be alarmed if there was a scuffle, as they considered him a lunatic, who was wasting his property and spending his money. At the interview with the plaintiff they told him that now he must abandon his business and go to the asylum; he was unwilling to go, and resisted, but they said, *it was no use to resist, they were prepared to take him by force.* They then took him down stairs, one having hold of each arm; in passing through the bar-room, he caught hold of the counter, and called for the landlord:

they dragged him from the bar, and notwithstanding his struggles forced him to the door, where his own wagon and horses had been brought round, by order of one of the Richies. They placed him in the wagon, from which he attempted to escape, but was forcibly held back by the defendants; when Samuel S. Richie took the reins and drove to the asylum, where the plaintiff was received, on presenting Dr. Kite's certificate and Mr. Warder's order for his admission, by Mr. Garrett, the superintendent.

At the asylum Hinchman was placed in a room with several insane persons, one of whom was extremely offensive in his person and behaviour, and another of whom made a violent attack upon him on the day succeeding his arrival, and inflicted on him a severe blow. He was denied all intercourse with his friends, and, in accordance with the rules of the institution, his letters were not permitted to be placed in the post-office. The plaintiff was here considered by the keepers to be a sane man. While in the asylum, *he was urged to execute a deed of trust of his property for his wife and children*, which he constantly refused to do.

After depositing Hinchman in the asylum, the wagon and horses were brought back to his farm by Samuel S. Richie, accompanied by plaintiff's wife and Elizabeth R. Shoemaker, one of the defendants, his sister-in-law; who took possession of the farm, as also of his books and papers, and commenced selling off his stock. One Jacob Heston, a judgment creditor of the plaintiff, thereupon issued execution, and levied on his personal property: this execution, on the 14th of January, 1847, was marked to the use of Edward Richie, one of the defendants, and a writ of *venditioni exponas* was subsequently issued, under which all the personal property was sold, much of it at a very great sacrifice. The sale was conducted by the Richies, who appear to have had control of the process, the sheriff not being present at a portion of the sale, which

occupied several days. Many of the goods were taken from the farm to the house of Elizabeth R. Shoemaker, at Germantown, after the sale.

On the 9th of January, 1847, Eliza W. Hinchman, the plaintiff's mother, made affidavit to a petition to the court of common pleas of Bucks county, for a precept in the nature of a writ *de lunatico inquirendo*, to inquire whether Morgan Hinchman was a lunatic, and such other matters as are required, by law, to be inquired into in such cases. On the 1st of February, 1847, John D. Michener was appointed commissioner for that purpose, and on the 4th of February, the writ was issued. The inquest (who were alleged to have been fraudulently selected from a list made out at Mrs. Hinchman's house) met at the asylum on the day following and were there qualified: witnesses were then examined, the two Richies among others, in the absence of the plaintiff; afterwards he was brought in, and began to converse with Eli K. Price, who was his mother's counsel; Hinchman inquired what was going on, and when he discovered their business, said he should like to have some of his friends there. Mr. Price asked, if he did not consider him a friend, to which Hinchman replied, he would rather have his friends there and his own counsel. He was not permitted to send for friends or counsel. A member of the inquest testified that he saw nothing in Hinchman's manner or appearance to warrant the belief that he was insane.

The inquest found that Morgan Hinchman was a lunatic, and had been so for eighteen months last past, *without lucid intervals*. On the 27th of April, 1847, the inquisition was returned, and confirmed *nisi*, and Lloyd Mifflin appointed committee of his person and estate, on giving security in $4000, which was duly entered.

In April, 1847, the fact that Morgan Hinchman was confined in a lunatic asylum, became accidentally known to his uncle, Benjamin M. Hinchman, his father's brother,

and Samuel B. Fisher, the husband of his father's sister, who immediately took measures to effect his release. Mr. B. M. Hinchman first called on Dr. Griscom, who said, he had not given the certificate of his insanity, but would have given such a certificate at any time within the last three years, if called upon to do so. He said, he understood Morgan was *wasting his estate, by wild and foolish speculations*, that he ill-treated his wife, and the night on which he left for the last time, he was so violent, that her life and that of the children were in danger. The doctor had heard this from his mother and other members of the family—he was his mother's physician. Mr. B. M. Hinchman replied, he supposed the doctor was aware that *there had been some differences between mother and son, and she had become exasperated against him;* that he must have known something of his mother's peculiar temperament; and that in all matters where her interest and feelings were concerned, her statements should be received with due allowance. The doctor said, he was present at Morgan's arrest, and narrated the facts attending it to his uncle. Mr. Hinchman next visited the asylum, in company with his sister, Mrs. Fisher, and had an interview with their nephew, which satisfied them of his sanity. In the course of two weeks the uncle again visited the asylum in company with his cousin, Howard Hinchman, and conversed with Mr. Garrett, the superintendent, in relation to his case. Garrett said, there was not much the matter with him, he might soon be discharged. Morgan then applied for liberty of the grounds, and to dine and eat in the parlour, and said, if there was any difference in the price of board he would pay it; *but it should be understood, this was not to waive his claim for damages.*

Edward Richie subsequently called on B. M. Hinchman, and spoke of Morgan's case; he said, he thought him insane, and that his friends did also, and advised that he should be placed in the asylum: he named his mother, his sister, his

sister-in-law, and others. He further said, that *it had been proposed, that if Morgan would allow his property to remain in trust for the benefit of his family and self, he might come out as soon as he pleased;* there would be no objection to his coming out then. Mr. Hinchman replied, that if Morgan was insane, it was not proper to let him out; and *if he was sane, not proper to deprive him of his property.* Richie then said, *the fact of Morgan's being in the asylum would interfere with the management of his affairs; he might have difficulty; and in case he left his property in trust, his friends would assist him in paying off incumbrances.* In June, 1847, Margaretta Hinchman (Morgan's wife) met his uncle at Edward Richie's house, and it was again proposed, that *if the property was put in trust, there would be no objection to his coming out of the asylum.* Mr. Hinchman replied, he could not see the propriety of either keeping his nephew in the asylum, or putting his property in trust, when, from all accounts, he was managing his property well: his wife said, he had been wasting his property, and she did not think him fit to manage it; and, as an instance, she said, he sold a pair of chickens to a coloured man, on credit, that he didn't know. She added, that he had never been guilty of any violence; he had never raised his hand against her, and she had never said so: she said, he could leave the asylum, *if he would put his property in trust*, come to Germantown and board with her sister, but he must be subject to the rules of the house; he must pay his board and that of his wife and children too. Mr. Hinchman remarked, with reference to the probability of their reunion, that it should be a *sine qua non*, that neither his mother, Samuel S. Richie, Elizabeth R. Shoemaker, nor some others, should be allowed to interfere, that he believed the chief difficulty had arisen from their interference; she answered, "Does thee think I've no judgment of my own?" The subject of the *trust* was then again mentioned, when she said, *if he did not, he must stay there till he could get out somehow.*

In July, 1847, Morgan Hinchman made his escape from the asylum, and immediately called on his uncle; he said, they had authorized him to leave, but would not consent to his going because he declined to go with Edward Richie. This was communicated to Richie, who said, he was not discharged; that he was more insane now than ever.

On the 13th of September, 1847, Morgan Hinchman presented his petition to the court of common pleas of Bucks county to quash the proceedings declaring him a lunatic and appointing a committee of his person and estate. And, on the 7th of February, 1848, after hearing depositions taken on both sides, the court set aside the inquisition and all the proceedings, on the ground that due notice had not been given to his near relations, as required by the act of assembly.*

On the 7th of November, 1848, John D. Michener, the commissioner before whom the inquisition of lunacy was held, filed a certificate in the court of common pleas of Bucks county, that he signed the inquisition finding Morgan Hinchman a lunatic, being ignorant that he had the power to refuse signing the same, or to grant him a *habeas corpus*, or to give him a fair hearing, or to insure him the right of self-defence; and that he did not intend by signing the inquisition to assert the truth thereof; and now certified (in conformity with the act of assembly) that there was not probable cause for the application: and further, that in withholding notice from his friends, he was not actuated by ill-will, but acted ignorantly, and as directed by the counsel employed against said Hinchman.

Mr. Garrett and Dr. Worthington were officers of the lunatic asylum. Benjamin H. Warder signed the order for his admission. Thomas Wistar, Jr., was shown to have taken part in the sale of the plaintiff's goods, and the removal of them from the farm.

A very great number of witnesses were examined as to

* See the opinion of Judge Krause, at the end of this case.

their belief in the plaintiff's sanity, who testified that he was a good farmer, and a shrewd business man.

The plaintiff having closed his testimony, *Mr. Gibbons* moved for the discharge of Dr. Evans, A. W. Hinchman, P. Garrett, Dr. Worthington, B. H. Warder, and Thomas Wistar, Jr., on the ground that they had been included wantonly and arbitrarily, and for the purpose of excluding their testimony; and cited *Wakely* v. *Hart*, 6 Binn. 316; *Brown* v. *Howard*, 14 Johns. 122; *Vandusen* v. *Vanslyck*, 15 Johns. 223; *Bates* v. *Conkling*, 10 Wend. 389.

W. B. Reed and *Perkins* opposed the discharge, and cited *Brotherton* v. *Livingston*, 3 W. & S. 334; *Bredin* v. *Bredin*, 3 Barr 81; 1 Greenl. Ev. § 358; Stevens' N. P. 1738; 4 Wend. 260.

H. J. Williams, in reply, 4 W. C. C. 79; 2 E. C. L. 465; *Child* v. *Chamberlain*, 25 E. C. L. 365.

Burnside, J., refused to discharge the defendants, Griscom, Garrett, Worthington, Wistar or Warder; but charged the jury that there was no evidence against Dr. Charles Evans or Anna W. Hinchman, and directed them to bring in a verdict of "not guilty" as to them.

The jury rendered a verdict in favour of Dr. Evans, but refused to discharge A. W. Hinchman.

The defence set up was that Morgan Hinchman, at the time of his confinement in the lunatic asylum, was actually deranged; and that the defendants acted throughout with a regard to his welfare and convalescence.

It was shown, that the plaintiff was married to Margaretta Shoemaker, on the 15th of September, 1839, immediately before which *she had executed a deed of trust to her brother*, John W. Shoemaker, *whereby her estate was settled*

to her own use, reserving to herself a power of revocation; and on the 10th of September, 1842, she executed a deed of revocation, by which *the whole of her estate was conveyed to her husband*, Morgan Hinchman.

Much evidence was introduced to show that the plaintiff for several years prior to his confinement in the asylum had exhibited symptoms of partial insanity, having on one occasion, it was alleged, been guilty of violent conduct towards his aged mother. After his removal to the country these attacks, it was said, became more frequent and more violent, and so excited the apprehensions of his wife, that it was determined by his family to send him to the asylum for medical treatment.

Accordingly, on the 6th of January, 1847, his mother, in consequence of what his wife had communicated, called on Dr. Griscom, and requested him to come and hear the story from her own lips. The Doctor expressed his readiness to give a certificate of Morgan's insanity, if it was requested. On that evening, the plaintiff's wife, his mother, his sister, Anna W. Hinchman, Edward and Samuel S. Richie, and Elizabeth R. Shoemaker, met at his mother's residence, and upon a consultation between them, it was determined, at the desire and request of his wife, that Morgan Hinchman should be placed in the asylum. The Richies declaring that they would have no hand in it, unless it was the wish and desire of his wife, and unless all the others had made up their minds as to the necessity and propriety of the step. After his arrest, in the manner described by the plaintiff's witnesses, his mother called on Mr. Price, and directed the necessary legal steps to be taken, which resulted in the application to the court of common pleas of Bucks county for an inquisition of lunacy, as above stated. The inquisition was alleged to have been held, and the jurors selected, in the usual manner, the sheriff testifying that it was not the practice in such cases to examine the witnesses in the presence of the supposed

lunatic; but that Morgan Hinchman did, in the present instance, request to have counsel to represent his interests, which request was evaded, Mr. Price asking him, if he was not satisfied with *him* as counsel; and the proceedings went on without allowing his wish for the presence of counsel or friends to be complied with. The plaintiff left the asylum on the 6th of July, 1847, after which he was registered as "discharged, restored to his usual health."

After his discharge, he requested Judge Stroud, who was related to both parties, to see his wife and sister-in-law, in reference to his return to his family. The Judge called on Mrs. Hinchman, at her sister's residence in Germantown, when she said,—they expected him to return; the house was open for him; that he could come and live there, and go in and out at his pleasure. Elizabeth R. Shoemaker, at the same time, remarked, that the house was hers; her sister was living there with her children, and of course he could not have control of her servants, or over her domestic arrangements; but, in other respects, he might remain there as unrestrained and comfortable as need be. On the result of this interview being communicated to the plaintiff, he flatly refused to reside at Germantown, and declared that instead of returning to his wife, she should return to him, with an acknowledgment that they (or she) were all wrong, and he was right.

It was also shown that, by the rules of the asylum, on the presentation of the certificate of a respectable physician, and the production of an order for admission signed by one or more of the proper committee, neither the superintendent nor the resident physician had any power to refuse to admit a patient. Benjamin H. Warder was a member of the committee in January, 1847; he admitted that he signed the order for the plaintiff's admission.

It was also testified, that the paper signed by John D. Michener, purporting to be a return to the court of common pleas of Bucks county, as commissioner in the inqui-

sition of lunacy, was obtained from him by threats of a prosecution; it was obtained for the purpose of being laid before the meeting of Friends. Michener did not know, when he signed it, that it was addressed to the judges of Bucks county, but said, the part which referred to his ignorance was true enough.

The defendants having closed their testimony, *H. J. Williams* moved for the discharge of Benjamin H. Warder, for the purpose of offering him as a witness.

W. B. Reed, *Perkins* and *D. P. Brown* opposed the discharge, and cited *United States* v. *Harding*, 6 Penn. L. J. 17.

The court refused to instruct the jury to discharge B. H. Warder.

The plaintiff called witnesses to explain the alleged violent conduct on his part towards his mother. It appeared that Mrs. Hinchman was in the orchard, with his wife, knocking down apples from the trees, with a stick; that plaintiff several times requested her to desist; and on her persisting with great pertinacity, took her by the arm, to lead her from the orchard; she resisted in a state of much excitement, commenced screaming violently, and on his attempting to move forward with her, fell on her knees, and abused him in strong language. The next morning, she left his house: before her departure, Morgan came up, and offered her his hand, which she refused to accept; and, as the witness testified, gave him a good tongue-lashing; she said, "I cannot accept your hand, and unless you repent I never want to see you again." This occurrence took place in the summer of 1844.

It was also shown, that the paper was not got from John D. Michener under threats of prosecution. That the overseers of the meeting were present when Michener began to make the acknowledgment; and on a suggestion

that it had better be put in writing, the paper was executed by him, and witnessed by two of the persons present, one of whom testified, that the certificate was not forced from Michener for meeting purposes, but was given by him willingly, Morgan Hinchman declaring that it was intended to be filed in the office. At the same time, Hinchman gave Michener an acknowledgment in writing, that it was received in mitigation of the damages caused him by Michener's acts in the premises, and intended to end all differences between them.

The plaintiff also called additional witnesses to prove his sanity before and at the time of his incarceration in the asylum.

The defendants likewise produced additional witnesses as to the lunacy of the plaintiff; and to sustain the character of Mrs. Eliza W. Hinchman for veracity, and forhe r kind and affectionate disposition towards her children.

After a trial which had extended itself to an unprecedented length, (having been commenced on the 9th of March, 1849,) the jury were eloquently addressed by *S. H. Perkins, Esq.*, for the plaintiff; by *George Griscom, C. Gibbons* and *H. J. Williams, Esqs.*, for the defendants; and by *David Paul Brown, Esq.*, in reply; when the following charge to the jury was delivered, on the 9th of April, 1849, by

Burnside, J.—Gentlemen of the jury:—I have reduced the charge I am about to deliver to you substantially to writing, and those points in which precedent is involved, I have written word for word. I do so because this is an exceedingly important cause, such a one as has never been tried in this state, and such a one as, I trust, will never arise again. But, if such a cause should ever arise again, I trust that whatever the supreme court shall decide

upon will be a rule for all men. I shall now proceed to offer you that charge.

I need not say, gentlemen, that I am deeply impressed with the novelty as well as the importance of this case. A correct determination of it requires our cool, calm, and deliberate attention, and our most deliberate reflection. Let us meet it in a way worthy of ourselves, without any improper feelings or prejudice, and with a strict regard to the law and the evidence: let us judge of it as we expect to be judged by Him who knows our inmost thoughts.

Conspiracy consists in an unlawful agreement, though nothing be done in pursuance of it: the conspiracy is the gist of the offence. Then, it is indictable, but it would not afford a civil remedy. So, a conspiracy to do a lawful act, if for an unlawful end, is indictable. Where men contrive and conspire to do an unlawful act, which oppresses another or unjustly subjects him to the power of those confederating, it gives effect to their purpose, either of extortion or mischief: such a conspiracy affords a civil remedy for damages, by an action on the ca se. I general, there must be a common design to do an unlawful act; when the fact of combination is established to the satisfaction of the jury, and the combination of the individuals in the unlawful enterprise is shown, or rather the connexion of the individuals in the unlawful enterprise, every act and declaration of each member of the confederacy, in pursuance of the original concocted plan, and with reference to the common object, is, in the contemplation of the law, the act and declaration of them all, and is original evidence against them all. It makes no difference at what time any one came into the conspiracy. Every one who does enter into such a common purpose or design is, in law, a party to every act which had been previously done by any of the others in pursuance of such common design.* This then, gentlemen, is a great, a settled principle of the law in rela-

* 1 Greenl. Ev. §§ 111, 233.

tion to this offence; and it is one which requires a court and jury to be careful that they do not involve innocent men, and also to take care that the guilty do not escape. I shall not enlarge upon it. It is, I admit, a charge easily made, and difficult to defend against. I am not for extending the law of conspiracy beyond its just limits—its settled principles; nor am I opposed to applying it to those to whom it ought to be applied.

You have heard, gentlemen, how Morgan Hinchman was arrested on the 7th of January, 1847, and taken to the Frankford asylum. Was he then insane? This is a fact for you to determine; and, in fact, it is the great, the leading fact in the cause. The learned counsel for the plaintiff contend that, as this proceeding was not upon oath or affirmation, it was contrary to the bill of rights, and a violation of the constitution of Pennsylvania. If you find, gentlemen, that Morgan Hinchman was insane at that time, I do not accede to that proposition; it would have been true if he had been charged with a crime; but the right to restrain an insane person of his liberty is found, as expressed by Chief Justice Shaw, of Massachusetts, "in the great law of humanity."

The Pennsylvania hospital was in existence half a century before the adoption of the constitution of 1790, and it was in existence and operation, as well as this asylum, when the amended constitution of 1838 was adopted. So that those gentlemen (and they were men of talent and distinguished ability, in both conventions, and especially the convention of 1790,) who formed this constitution, had the practice of the Pennsylvania hospital before them; and the late convention had before them, in addition to that, the practice of this asylum. I then negative the proposition, that it is a violation of the constitution of Pennsylvania, so to arrest and confine an insane man.

Gentlemen, these institutions are the pride of our state; they are the highest honours that the city and county of

Philadelphia possess. And there is no part of our population that have done more, that have expended more time and more money, to benefit the condition of the insane, and to erect and sustain these institutions, than the society of Friends. Perhaps they have done more than any religious denomination in relieving the condition of this unfortunate, but too long neglected class of society. I am not, gentlemen of the jury, for throwing any impediment in the way of these institutions; but, at the same time, as I shall show you, they are subject to visitations by the law of the land, like every thing else; and if they are abused, they are amenable to the common law.

Gentlemen, I am proud to say, that this is the first instance of alleged oppression in any of these humane or meritorious institutions. If wrong has been done, they are open to the examination of the civil courts, and the question will be, in each particular case, whether the safety of the person himself, or that of his family or friends or neighbours, required that he should be restrained for a time, and whether restraint is necessary for his restoration or will be conducive thereto. This is the great question. In considering this question of restraint, we must not fall into the vulgar error, that a person is not to be considered insane, when he does not always show wildness in his conduct, in his every day transactions. It is now ascertained and well established, by the investigations of learned men, and the light of science, that a person may show shrewdness in his business, and intelligence and cunning in his arguments, and still be decidedly insane on some one or more subjects; and if confinement or restraint, with regular medical treatment, are necessary for the restoration of such a person to a perfectly sound mind, they are the best friends of the party who enforce it. Illusions, which are deceptive appearances, and false views and hallucinations which are the acts, enlightening the mind, sometimes exist in persons who appear sound to the generality of their

neighbours. This species of insanity will show itself in outbreaks of passion, occasionally in sullenness, and in various ways, to the parents, wife and children of a man, when those who frequently visit him will not discover it. I entertain for our insane hospitals the highest gratitude; they often confer on the miserable and unfortunate maniac the restoration of mind and health; and those who erected them with their money, and who devote their time and attention to these institutions of benevolence and charity, at no profit to themselves, are deserving of the highest praise. Our legislature are now erecting, at Harrisburg, an asylum for the insane poor, the first appropriation for which was, I think, one hundred thousand dollars, at the expense of the tax-payers of the state.

I return to the question, whether or not Morgan Hinchman was partially insane. That question is for you to determine from the evidence, and, in calling your attention to this, I call it to the whole evidence. For me to read the whole evidence to you, would take a day or two, and it has been so recently discussed, so recently and so elaborately considered by the counsel on both sides, that I deem it unnecessary. • Your minds have been kept to this cause as closely as I could occupy them, from the commencement to the present time. But, gentlemen, I ask you this question, —Did not Morgan Hinchman's mother and his wife think that he was insane? Was it not at their instance that he was removed to the asylum? It is urged by the learned counsel who last addressed you, that the wife had no hand in it, and was imposed on. I am unable to discover in the evidence any foundation for this position. Is there not evidence that Samuel Richie said he would have nothing to do with it, unless it was the desire of Mrs. Morgan Hinchman? Does not the whole evidence show that she was at Mrs. Eliza W. Hinchman's when the whole matter was concocted?—when the determination was come to, to take Morgan Hinchman to the asylum? You have heard

who were there. There is one thing that struck me as remarkable. This old lady seems to be no common woman. It appears she was left a widow when she was a young woman, with five or six very young children. On the death of her husband, her means were not very extensive, and yet some of her children appear in court, and they have an education and intelligence which would do credit to the most wealthy of the commonwealth. You have the testimony of the mother, and you are the judges of it. She solemnly affirms that she made the application; she came to her son's friends to have him removed to the asylum, because she loved him, as she no doubt did, and because she thought it would improve his health. The affair in the orchard was an unfortunate occurrence, and I submit to you, as rational, intelligent men, whether it was possible that revenge could rankle in the mother's bosom, from an occurrence of that kind, for so long a time. You, and not I, are to judge of it. Although the mother did not visit the son, yet the son, occasionally, as you have heard, called on her on business. And is it possible that such a diabolical spirit of revenge could exist in a mother's heart such a length of time? That she gave her sanction to his removal to the asylum, that it was at her desire that he was removed thither, that she was the great cause of that removal, is to me manifest; but I submit that to you.

With regard to the wife, the evidence, as far as I can judge, is that she was a mild, a kind, an affectionate wife; she was the wife of his bosom, she was the mother of his children, his partner for life, for better and for worse. If he was subject to spells of unhappiness and disorder, she knew it better than all others. I submit to you, that she knew the very throbbings and pulsations of his heart, and that if he was disturbed and disordered, if he was agitated with disease, she knew it best. Why did *she* consent to his being sent to the asylum? What loving, kind and affectionate wife ever desired to destroy her own happiness

by disgracing or distressing her husband? Gentlemen, I make these observations to you in order to bring them to your minds, because this case presents some features that are very extraordinary indeed. What then was the object of placing Morgan Hinchman in the asylum? Was his mind diseased, as Dr. Evans informs you, and was it to restore him to health, wife and family, and friends and happiness, that he was confined in the asylum, or was it for some mercenary purpose, as is alleged? If it was for his benefit, as his friends honestly believed, and they had reasonable cause for that belief, that he was partially insane, and you are satisfied of that insanity, this action will not lie, and cannot be maintained. On the other hand, if he was placed there for a mercenary purpose; if he was placed there, as alleged, *in order to obtain a deed of trust of his property for his wife and children*, the plaintiff will be entitled to your verdict. The first evidence which tends to support the mercenary view of the case is that of Jonathan Smith; he says he thinks he heard Morgan Hinchman and Mr. Garrett talking about a deed of trust, and settling affairs. "It was Mr. Garrett," said Mr. Smith, "I heard say it; then, he said, he would be well enough in a short time, and get out:" on the cross examination on that point, he added, "as I passed through, Garrett said, that *if he would sign the deed he would soon be well, and all would then be right, and then he'd get out.* You have heard Mr. Benjamin Hinchman: he says, that in a conversation with Edward Richie, about an interview with Margaret Hinchman, Edward Richie said, that "*if Morgan Hinchman would allow his property to remain in trust for the benefit of his family, he might come out of the asylum as soon as he pleased;*" and that he (Richie) wished, "*that Morgan would put his property in trust, and then there would be no objections to his coming out.*" You have also heard what the wife said, or what Mr. Benjamin Hinchman stated, that she said to him. He states, that she said, "*that if he* (Morgan)

assigned it (his property) *over, he might come out, but if not, he might get out as he could.*" You have also heard the conversation which Abraham Sink heard between Dr. Worthington and Hinchman: he (Sink) says, "*I have heard Dr. Worthington speak of his property; Dr. Worthington advised him* (Hinchman) *to give up his property; that he would not live with such a woman like her again, but would go to Texas; property without liberty would be of no use to him.*" If, then, Morgan Hinchman was placed in this asylum for the mercenary purpose of getting him to convey his property in any way, it was a foul conspiracy: if it was honestly and conscientiously done, for the purpose of restoring him to health, they conscientiously believing him to be diseased, and you should be of that opinion, it presents a case in which, as I have told you, the patients may be taken in charge by relations and friends, by wives and by mothers. And if I have a wish on the face of the earth, if it should please God to visit me with such a misfortune, I would hope that my wife and children would cause me to be removed to one of these institutions, which are an honour and a blessing to your city and county.

It appears that the plaintiff and his wife, when they were married, were about equal in wealth. He very generously executed a deed of trust for the benefit of his wife, but unfortunately there was a power of revocation. And I tell you, gentlemen, and all who hear me, that if any one wants to settle any property on his wife and children, he will not put it in the power of husband or wife to alter or change it, because my own observation is this:—I never knew one instance in the whole course of my life, where the husband could not by some means or other obtain the consent of his wife to make a change; he will do it by love or affection, or if that will not do, he will too often do it by bad treatment. They (Hinchman and wife) did change it, and that property possibly depreciated in value, as you have heard; his money wasted some, no doubt. Whether the wife, and

the friends of the wife, wished to obtain for her permanent possession of the property, by placing him in an asylum, in order to secure to her a competency, is for you to determine. And if they did pursue that course, and if you are satisfied that he was a sane man, or rather, that he was not an insane man, it was a mercenary purpose, and one which will support the *narr.*

Now, gentlemen, as you will see, I have reduced this cause to a simple inquiry; I have endeavoured to bring it before you in the simplest possible form, in order to lessen your duties; and I consider it the duty of a judge to bring questions before a jury, in such a manner that they will fairly understand and fully comprehend them, and then they are the persons to decide. And while I shall never permit a jury to encroach upon the right of the court, in matters of law, I, on the other hand, shall be the last man to meddle with a jury on matters of fact.

I shall now, as briefly as possible, answer the defendants' points, and they are really multiplied to an extraordinary extent. I suppose the notion is, that a man who comes from the Allegheny mountains knows nothing about the laws of Pennsylvania.

1. That unless the jury are satisfied that the defendants procured the commission of lunacy to be sued out by the mother, the plaintiff cannot recover on the first and second counts in the *narr.* *Ans.*—I agree to this, with the exception that the jury will recollect that the decision to place him in the asylum was come to on the 6th; that he was carried there on the 7th; that application was made to Mr. Price on the 8th; and that the petition was signed on the 9th, and immediately forwarded to Doylestown. The jury will judge whether the proof is such as to satisfy them, that it was a part of the original concoction, to take out the commission of lunacy, and to take it out for an improper purpose.

2. That the suing out of a commission of lunacy cannot

be ground for this action, unless it was done, or procured to be done, by the defendants, and was done by them maliciously and without probable cause for believing the plaintiff to be deranged, and that it is the duty of the plaintiff to establish, both malice on the part of the defendants, and the want of probable cause. *Ans.*—I accede that the suing out of the commission was a legal proceeding, and that the plaintiff must for that show malice, and the want of probable cause.

3. The defendants cannot be found guilty, under the second count, unless it is proved that they did conspire to take the plaintiff, and confine him in the asylum, for the purpose of enabling some of the defendants to get possession of his property—that being the conspiracy charged in that count. *Ans.*—The conspiracy must be substantially proved as averred in the count, that two or more of them did conspire for the purpose of enabling some of the defendants to get possession of his property, as charged.

4. That the defendants cannot be found guilty under the third or fourth counts, unless it is proved that the defendants conspired to confine the plaintiff, to get possession of his property, and to compel him to settle the same on his wife and children. *Ans.*—I have already substantially instructed the jury as desired, upon this point—that the plaintiff must substantially prove the case he sets out in the declaration.

5. If the defendants believed that the plaintiff was deranged, and required for his recovery medical treatment, under restraint, the verdict must be for the defendants. *Ans.*—The general charge instructs the jury on this point; I accede to it.

6. That the taking of the plaintiff to the asylum, and his detention there, even if unlawful, and a trespass, are not acts for which the plaintiff is entitled to recover in this form of action. *Ans.*—Certainly not; unless there was a *conspiracy* for that purpose.

[Hinchman v. Richie.]

7. That if the defendants acted under circumstances, such as would have induced a man of ordinary intelligence to believe the plaintiff insane, and requiring medical treatment in an asylum, the plaintiff cannot recover. *Ans.*—I accede to this, if the jury find it was their only motive to restore him in health and soundness to his family.

8. That the application of the wife and mother, accompanied by their statement that the plaintiff was deranged, constitute probable cause, if circumstances warrant a reasonable belief of insanity or unsoundness of mind. *Ans.*—There are no relations so near or dear to the affections of a man as his wife and mother, and every presumption is in favour of their affection and regard, until the contrary is shown. I cannot say, under the immense mass of contradictory evidence in this cause, that the application of the wife and mother, accompanied by their statement that the plaintiff was deranged, constitutes probable cause. I leave it to the jury to determine whether the circumstances proved warrant a reasonable belief of insanity or unsoundness of mind. I can only say that if he *was* insane, it was probable cause.

9. That, if even there were any evidence of any of the plaintiff's property having been disposed of by any of the defendants, and the proceeds not accounted for, it would not be evidence to support this action. *Ans.*—It is not evidence to prove a conspiracy, and support the action; but, if a conspiracy is proved, the fact done in furtherance of it would be evidence to increase the damages.

10. Knowledge of the existence of a conspiracy must be brought home to every defendant, otherwise, his acts do not make him a party to the conspiracy. *Ans.*—They do not, unless the act is done in pursuance of the originally concocted plan, and with a reference to the common object. If it is done in furtherance of the common purpose, he is, in law, a party without regard to the time he entered, which is for the jury.

[Hinchman v. Richie.]

11. Receiving a patient, with the usual certificate and order of the asylum, unless known that he was brought there by a malicious and unlawful conspiracy, does not make the superintendent and resident physician conspirators. *Ans.*—Certainly not, as to the abstract fact, it does not make the superintendent and resident physician conspirators, unless they reported corruptly to the managers to keep the patient there, in furtherance of the conspiracy.

12. Signing an order of admission of a patient, on the application of his mother, accompanied with the certificate of a regular physician, in the usual form, and in the usual bond, is no evidence of being a party to the conspiracy laid in the *narr.* *Ans.*—To this I accede fully as to the abstract proposition.

13. Signing a certificate by a medical man, that he believes the party to be insane, is no evidence of being a co-conspirator, unless previous knowledge of the existence of a malicious conspiracy is brought home to him. *Ans.*—I fully accede to this.

14. None of these defendants can be made answerable for any act done while serving on the inquest, as one of its members, nor for his decision or verdict as such. *Ans.*—I feel it my duty to make this further answer to the 11th, 12th, 13th, and 14th points. I instruct the jury, that the officers of the institution ought not to be subject to an action for damages, or held responsible in this action, unless they had knowledge that the plaintiff was sent there for an improper purpose; or, after he was there, they corruptly joined in keeping him there, for an improper purpose; nor the physician, unless he gave a corrupt certificate; nor the jury of inquest, unless they had themselves fraudulently placed on the jury for a corrupt purpose. You understand me, gentlemen. You have heard the rules of this institution read, to a certain extent. It is conducted by twenty managers. They say, when a patient shall be received, and when discharged. When a physician, having no im-

proper connexion with the matter, honestly gives his certificate that a man is insane, and conscientiously believes that he *is* insane, he (the physician) is not liable in an action. If a man is a superintendent there, as was Mr. Garrett, who it seems was very kind to every body, (the only fault that I can see in him, is his conduct in relation to the letter) he has no power to refuse receiving a man, nor has he any power to discharge him; and unless there is evidence that he joined corruptly in keeping a man improperly there, I would not find him guilty; because then no man would accept such a place, and it is all-important that such institutions should be kept up, and that their officers should be respectable and intelligent men. So with Mr. Warder: what did he do? He was one of the fellow members who signed the order for the admission of Morgan Hinchman, and which on its face is all very regular. Unless he did that corruptly, he ought not to be answerable. His duty was performed when he gave the order for the admittance of Hinchman to the asylum: and unless he joined as a manager in corruptly keeping him there, (and the evidence on that point ought to be perfectly satisfactory, before you find him guilty,) Mr. Warder ought to be discharged. I will take up the case of all the defendants in regular order hereafter. But to return to the defendants' points. We now come to the 15th and 16th points.

15. The finding of the inquest, that the plaintiff was insane, is a justification of the arrest and confinement, so long as it is necessary for the health and improvement of a party.

16. The finding of an inquest, that a party was insane, is a justification of the arrest and confinement, so long as it is necessary for the health and improvement of a party.

Ans.—These two points run into each other, and they will be answered together. The inquest, as well as the whole proceeding, has been attacked on the ground of fraud.

Fraud may poison a record, which may include the solemn finding of a jury, as well as a deed or any species of contract. The allegation is here, that the whole proceeding was done under circumstances of contrivance; the selection of jurors is said to have been fraudulent. If so, the whole proceeding was fraudulent, and they were an illegal body, sitting on a sound and sane man, in an insane asylum, for a corrupt or illegal purpose. If, on the evidence, the jury should be of that opinion, then I instruct you that the fraudulent finding of the jury was no justification, before it was set aside, of a fraudulent arrest. If you find to the contrary, that there was no fraud, then the finding was *primâ facie* evidence, before it was set aside, and the position of the defendants' counsel is correct.

17. The court of common pleas of Bucks county, *and the court only*, had authority to direct to whom, and what notice should be given of the inquest; and if no such notice was given, the omission cannot be imputed as a fault to any of the defendants. *Ans.*—I accede to this; the act of the 15th of June, 1836, § 6, *Purd.* 782, provides that "it shall be the duty of the court, at the time of granting any application, to make such order respecting notice of the execution of the commission, to the party with respect to whom such commission shall be issued, or to some of his near relations or friends, who are not concerned in the application, as the said court shall deem advisable." It is true, the court made no order; no notice was given either to the party himself, or to his paternal relations. The first thing he knew, he was brought down and examined before the inquest. But it was not the fault of the defendants, but of the court in not making the order.

18. The finding of the inquest, fairly summoned and having fairly decided, is proof of probable cause. *Ans.*—This is answered in the affirmative; if the jury believe that the defendants were actuated by no improper motives, in arresting and confining this man, and it was not done to prevent a fair trial, I accede to this point.

[Hinchman v. Richie.]

19. If the jury believe that the defendants acted at the solicitation of the plaintiff's wife and mother, and upon their representations that he was insane, *without malice or interested motive*, the plaintiff cannot recover in this action. *Ans.*—This point is fully answered in the general charge.

Mr. Griscom thinks his brother (Dr. Griscom) stands on different ground from the other defendants, and has put ten additional points to the court. The jury will take the answers already given according as they apply to Dr. Griscom's case, but I will examine them and give such further answers as I deem necessary.

20. That if the jury are satisfied from the evidence, that Dr. Griscom had no acquaintance, connexion, or consultation, with the other defendants, or any of them, nor with any other person or persons, with reference to the taking or placing of the plaintiff in the asylum, previously to that design having been matured and acted upon by others—and then only gave *professional opinion*, at the request of the mother and wife, without any connexion, concurrence, or co-operation with any of the other defendants—then he is not liable. *Ans.*—If the jury find that such are the facts, I accede to it.

21. There is nothing alleged against Dr. Griscom, (according to Mr. Perkins' summing up,) in the argument for plaintiff, except that he *advised* the plaintiff to acquiesce in the design of those who *did* take him; and all the proof shows that any advice which he gave, was imparted to plaintiff by Dr. Griscom, solely and purely with a view to the good—the medical aid and benefit of the plaintiff—the medical opinion and advice thus imparted being entirely independent of the idea of plaintiff going to the asylum, as a part of the treatment, unless at his (plaintiff's) own free will and choice. *Ans.*—If the jury find the facts as stated, I agree to this.

22. That the jury may presume, from all the testimony taken together, and particularly that of Eliza W. Hinch-

man, as well that Dr. Griscom went to the tavern to oppose, as to forward any design to take the plaintiff to the asylum, unless by his (plaintiff's) free will and choice. Mr. Hinchman's testimony showing that he declined *advising* such a course, (when he referred her to friends of her own meeting;) and that, so far as any action or advice of his went, it is not shown that he did, while there, approve of any resort to compulsion, and that, if not, he is not liable. *Ans.*—It is for the jury to say how Dr. Griscom went there, and what part he took.

23. That, as there is no proof that Dr. Griscom ever had any knowledge or connexion, or in any way was ever consulted or conferred with by the other defendants, or any of them, or any person whatever, with regard to the *property*, or any disposition of it, or any of the business or domestic affairs of the plaintiff, or any subject relating to these subjects, at any time; but that the proof is positively and clearly the contrary, by Eliza W. Hinchman's testimony, and all the evidence in the cause; he cannot be held liable on these charges. *Ans.*—The jury are the judges of the motives, and the part Dr. Griscom took, and will apply the law to the case as already explained.

24. That malice express or implied is essential, and that it cannot be presumed against Dr. Griscom, from all the testimony, but altogether the contrary. *Ans.*—This is a question for the jury.

25. That the *professional advice*, or opinion of a physician, given to any one to whom he is called to give it, honestly and truly, with intention to benefit the health of the person advised, without any other action on the physician's part, (excluding the idea of mal-practice, of course,) cannot, in any case, subject the physician to an action for damages. *Ans.*—Undoubtedly, where a physician gives a certificate, honestly and *bonâ fide*, he ought not to be subjected to damages.

26. That any opinion expressed by Dr. Griscom, as to

the cure of Morgan Hinchman, can no more subject him to punishment or damages as a conspirator, than can the opinion entertained, expressed, and acted on by Dr. Evans, subject him thereto. *Ans.*—The first part is a matter of fact for the jury to determine; and if they find that he was a *sane* man, and there was a conspiracy, and his acts were in furtherance of that conspiracy, he is a conspirator.

27. Dr. Griscom cannot be made liable, unless the jury are satisfied, from the evidence, that he entered, at some time, into the *conspiracy*, with the common design or purpose, with others, to effect what is laid in the declaration, to wit, to seize and incarcerate the plaintiff, to get possession of his property; compel him to make disposition of his property; to corrupt and pervert the mother's and wife's minds, to turn them against the plaintiff; to influence the mother to sign and affirm to the petition to institute proceedings in lunacy, &c. (See 1 *Greenl. Ev.* § 111.) *Ans.*—If the jury find the facts as there stated, undoubtedly, he ought not to be liable: I agree to this.

28. That conspiracy is the *gist* of the action. *Ans.*—I concur in this.

29. That *malice*, want of *probable cause*, and damage to the plaintiff, must all concur, and be proved, to enable plaintiff to recover. *Ans.*—I do not exactly go that far: this is true, if the jury believe he was honestly placed in the asylum for the re-establishment of his health and mind.

Now, gentlemen of the jury, I will take up each defendant's case, commencing with that of Dr. Griscom. From all that appears in this case he is a man of excellence and worth. It appears that he was the physician of Morgan Hinchman, his family, and of his mother, and that he was a friend of Morgan Hinchman. The mother went to him, and asked him to go to the Red Lion hotel. There is no evidence to show that she communicated any thing to him except that her son was insane, and that he was about to be taken to the asylum. Now, was he honest in that im-

pression? If he was honest in it, and if he really did nothing but clap him on the back and say—"Come, my good fellow, you are insane, go to the asylum, and go peaceably and quietly,"—if that is all Dr. Griscom did, I would be inclined to say that he ought not to be found guilty, and I presume the jury will not convict him under these circumstances. But if the jury believe that by his presence, his aid, and appearance, Morgan Hinchman was induced to yield to the plans of those who had assembled there for the purpose of carrying him to the asylum, and if they believe that Morgan Hinchman was of a perfectly sound mind, and that he was taken from that tavern for the purpose of extorting from him a conveyance of his property for the benefit of his family; if Morgan, in consequence of the presence and acts of Dr. Griscom, was prevented from clearing out and running away, then you must consider Dr. Griscom a party to the transaction, and I submit it to you upon these principles. I have no doubt that Dr. Griscom is a most excellent man; these defendants are all gentlemen, and clever men. I have no doubt some of them acted hastily, and I will put the case as fairly for them as they can possibly ask, or any citizen require; that if the action was *bonâ fide*, and they had reasonable cause to believe that Morgan Hinchman was an insane man, and required restraint and confinement, they ought to be discharged. And this is the first time that the question has been decided in Pennsylvania to this extent. But if the restraint and confinement of the plaintiff were effected for a mercenary object, which you are to determine from the evidence, of which you, and not I, are to judge, it is a different case, and an action for damages will lie.

The jury will bear in mind, that it is their duty to find in favour of those defendants against whom there is no proper evidence, and who do not come within the principles on which they have been instructed, as conspirators. As to Anna W. Hinchman, my mind has been, and is strongly

inclined in her favour, and I will submit her case to you. She was present at her mother's, when it was decided to take her brother, Morgan Hinchman, to the asylum. There is no evidence, that I can discover, that this daughter said any thing; there is no evidence that she opened her lips on that occasion; and it could scarcely be expected, that she would resist her aged mother. And, unless there is evidence that she encouraged her mother, it seems to me, that I would not convict the child of any woman, under such circumstances, of a conspiracy. You understand me, gentlemen; there is no evidence that she encouraged her mother, if there was, it would present a different case: she was present; and is it really to be expected, that an amiable daughter would resist a venerable mother, in a thing of that kind? You, gentlemen, will judge of her, on the principles I have stated.

Mr. Garrett is the superintendent of the asylum; as I have already remarked on this case, this gentleman had no discretion at all, under the rules of the institution. If he did say what you heard, about Morgan Hinchman conveying his property, he had no power to discharge him; and is not that a circumstance in his favour? Unless the jury are satisfied, from the evidence, that he afterwards joined and combined to keep Morgan Hinchman illegally in confinement, they should find in his favour. The same principle applies to the case of Dr. Worthington; unless he joined in the conspiracy, after Morgan's confinement, he also ought to be discharged. He had no power to discharge any patient, he could only report to Dr. Evans; and unless there is some evidence that he acted corruptly in reporting to Dr. Evans, the visiting physician, the jury should find in his favour. It seems to me, and I have said, that my feelings are in favour of the asylum, unless there was evidence of a concocted plan.

Benjamin H. Warder is in precisely the same situation as Dr. Worthington, and Philip Garrett, the superintendent.

According to the rules of the institution, it seems, that it was his duty to give an order for the admission of any patient, on the certificate of a respectable physician. Unless he did some corrupt act to further the confinement of a sane man, you ought to give a verdict in his favour.

As for Dr. Kite, if he were not in the original conspiracy, and gave a conscientious certificate, I would not hold him responsible; nor do I see the legal principle upon which he can be convicted. His conviction would deter physicians from giving their certificates, and have an unhappy effect upon society. But, really, did he give a corrupt certificate? If the jury believe that Dr. Kite did give a corrupt certificate, it would materially alter the case, and there is one thing that makes against him; he stated, according to the evidence, that *he had not seen the patient in four months;* this, I think, is the strongest feature in his case. The rules of the institution do not require that the certificate should state, when the examination, upon which it was based, was made. The British statute requires that the certificate should state, when the examination was made, which must not have been made more than seven days previous to the date of the certificate; and then, two physicians must be present at the examination. If the managers of this institution would take my advice, they would adopt the provisions of the British statute, and require that all examinations should be personal, and it should be stated on the certificate when they were made. However, gentlemen, it is for you to judge of Dr. Kite: for the mere giving of the certificate, I would not find him guilty, unless you believed he certified falsely; if he acted conscientiously, I think he ought to be discharged.

I put Mr. Biddle on the same principle; if he acted honestly as a juror, he is not liable, and ought not to be held liable; but if he had himself placed on that jury for the purpose of having Morgan Hinchman convicted of insanity, then he comes in with the others. If you believe,

as the sheriff swears, that the jury was fairly selected, and Mr. Biddle was fairly placed on it, then you ought to discharge him; and I leave him with the rest to you.

With regard to Thomas Wistar, Jr., his first appearance in this drama was after the confinement of Morgan Hinchman, and after the sale of his property. For, although one witness thought he saw him at the sale, I think, it is clearly proved he was not there; however, that is for you to decide. There certainly is no evidence that he had any thing to do with the original concoction. The mother wanted to see him, but did not; there is not a particle of evidence that he had any thing to do with placing Morgan Hinchman in the asylum: all his acts were subsequent to that transaction; he did nothing but acts of kindness to Mrs. Hinchman, who, say what you please, is an unfortunate woman, and I certainly would not convict him of conspiracy for doing acts of kindness, after the conspiracy had been concocted, (if a conspiracy was formed, at which he was not present) unless those acts of kindness tended to further the conspiracy, and were designed for that purpose. I then say, that if the jury are satisfied that Thomas Wistar did nothing to further the common design, he ought to be discharged.

And I submit it to you, gentlemen, that, if there was a conspiracy, Samuel and Edward Richie, as well as Elizabeth R. Shoemaker, were at its concoction: Mr. Lippincott, Mr. Elkinton, and Mr. Whitall were not there, but helped to arrest the man. For these six defendants I have nothing to add; if you believe, that on the 7th of January, 1847, Morgan Hinchman was a sane man, and they, or any of them, maliciously caused him to be arrested and imprisoned in the Frankford asylum, they are all by law subject to the consequences. I think it is due to Mr. Lippincott, to Mr. Whitall, and to Mr. Elkinton, to say, that I am fully satisfied in my own mind, that they had no intention to violate the law of the land. But, if the Richies, with the mother,

had this man arrested, when you are satisfied that he was perfectly sane, their joining in the act of arresting him and taking him to the asylum, makes them, in law, principals, and it is not in my power to exonerate them. I cannot change the law; I am bound, as I am answerable to my God, and to my country, to declare the law as I believe it to be: I have done so, and however hard I may think it, I cannot help it; they are principals, if it was a corrupt design to take a sane man to an insane asylum.

To conclude, I have told you that, if Morgan Hinchman was a partially insane man, who required medical treatment, and if he was placed in the asylum for that purpose, and for that only, the plaintiff ought not to recover. But I think it my duty to say to you, and from that duty, with the blessing of God, I will never shrink, that it seems strange to me, that a man who is sober and industrious, a good farmer, capable of attending closely to all his duties, kind to his wife and children, but who, no doubt, like other men, had some oddities, was insane. In these cases, say the supreme court, in *M'Elroy's Case*, (6 W. & S. 451) "the question is, was he deranged to such an extent as to disqualify the traverser" (in an appeal from the inquisition of lunacy) "from conducting himself with personal safety to himself and others, and from managing his own affairs, and discharging his relative duties." Depart from this rule, and where shall we be? Now, I have reduced the cause to this simple inquiry; if you are satisfied that Morgan Hinchman was so partially insane that it was dangerous to himself, dangerous to his wife, and dangerous to his children for him to be at liberty, and that these defendants acted from pure motives, and placed him in the asylum for the purpose of restoring him to health—restoring him sound to his family, I hold them justified. On the other hand, if they placed him there for a mercenary purpose, they, the six to whom I have referred, and against whom there is some evidence, of which you will judge, ought to be mulcted in damages.

[Hinchman v. Richie.]

I say, gentlemen, that I have brought this cause to a simple issue. It is an important cause, and it is one which you are to determine; I want you to do it coolly, and calmly, and deliberately, apart from excitement of any kind: judge from the evidence, judge as you expect to be judged hereafter: I know the ground I have taken, and that I have endeavoured to do my duty conscientiously. If the man was a sane man, and you so find, and they knew that he was sane, and concocted the scheme for the purpose of obtaining a deed of trust, it is an aggravated case. Yet, do not suffer yourselves to be carried away, still act with deliberation and coolness; do not suffer yourselves to do injury by giving excessive damages, which would tend to impoverish and ruin the families of the defendants.

Gentlemen, I have nothing more to say; I am satisfied in my own conscience, that I have done my duty in this cause, and I leave the result of it to you.

The jury found a verdict in favour of the plaintiff, against Samuel S. Richie, Edward Richie, John Lippincott, George M. Elkinton, John M. Whitall, John L. Kite, and Elizabeth R. Shoemaker, and assessed the damages at $10,000; and in favour of the other defendants.

The counsel for the defendants, against whom a verdict had been found, moved for a new trial; and also in arrest of judgment, alleging that the third and fourth counts were improperly joined with the others, and also that the offence laid in the *narr.* is trespass and false imprisonment and not the subject of an action on the case. On the 21st of April, 1850, the court refused the rule for a new trial, overruled the motion in arrest of judgment, and entered judgment on the verdict.*

* If a person be so insane that it would be dangerous to suffer him to be at liberty, any person may, from the necessity of the case, without warrant, confine him for a reasonable time, until proper proceedings can be had for the appointment of a guardian; and if, before measures can be taken for the appointment of a guardian, he become sane, and be released, the party con-

fining him will not be a trespasser. No one, however, has a right to confine an insane person for an indefinite period, until he shall be restored to reason, but upon compliance with the formalities of the law. *Colby* v. *Jackson*, 12 N. H. 526. A person proceeded against as a lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time to produce his witnesses before a jury. The jury, upon the execution of a commission of lunacy, have a right to inspect and examine the lunatic; and they should do so, in every case of doubt, when practicable, and should direct the person in whose custody the lunatic is, to produce him, or to permit him to attend before them. *Russell's Case*, 1 Barb. Ch. 38.

The opinion of the court of common pleas of Bucks county, setting aside the proceedings of the inquisition of lunacy, in the case of Morgan Hinchman, was delivered on the 7th of February, 1848, and is here subjoined, in order to complete this important cause.

In the matter of the Inquisition finding Morgan Hinchman a Lunatic.

KRAUSE, President.—These proceedings show defects that cannot be overlooked, and which would be fatal under the act of 13th June, 1836, if even there had not been too great haste in executing the commission and placing Mr. Hinchman under disability as a lunatic. The 6th section requires the court to direct notice, either to the party in respect of whom the commission shall issue, or to some near relations or friends, who are not concerned in the application, and the object being to procure a defence when that may reasonably be made, it is obvious that such as counsel a finding against defendant, or desire it, are excluded from that list of persons, as ineligible to stand in his stead. For some purpose or other this direction was not asked of the court: and notice was not given by the commissioner. Nor could he have given any that would be held timely from the 1st to the 5th February, the space he allowed to intervene between the presentation of the petition and the meeting of the inquest. The idea seems to have been entertained that to have blood relations present, though known to be against the party, was enough to satisfy the letter of the law; and consequently, his friends who might have stood in his defence—who might have brought forward the numerous witnesses in Bucks county and Philadelphia, who now testify he was a sane man, and thus have carried out its spirit—had no information of his confinement, or the causes for restraining him of his liberty, or the time and place fixed for the trial. Nor was he himself summoned beforehand, or brought in at the time to be present at the examination of the witnesses, on whose testimony he was pronounced incapable of exercising the rights and duties of husband, father and citizen. He was in fact not present for any purpose of defence, but for exhibition merely—a conclusion that is forced on the mind by the whole course of conduct; for the witnesses had been heard when he was called into the room; his desire to have friends and counsel to aid him, was disregarded, and the business affecting all his high interests was concluded after he had been removed. In *Ex Parte Cranmer*, 12 Ves. Jr. 455, Chancellor Erskine says, "the party must certainly be present at the execution of the commissioners; it is his privilege:" and such must be the construction of our statute, except where, from the necessity of the case, it

is impracticable to give literal force and operation to the principle, as in the state of facts instanced in the third division of the second section, by which a commission may be executed against an inhabitant of the state, who is absent from it, in the county containing his real estate. But that is justified on the ground of its being a purely beneficial measure, to save the property from impending mischief; and, to prevent oppression, the court exacts ample proof that such is the object, and directs extraordinary efforts to be made, by publication or otherwise, to reach the party with notice. In all other cases provided for by the act—as well that under consideration as that where the alleged lunatic is in the commonwealth, but has no fixed residence—he is followed, and the commission is executed where he is found, that this privilege of being present may be secured to him, and secured not merely for exhibition of him to the commissioner and inquest—though that is doubtless one purpose—but also to give him full opportunity of defeating proceedings improper, for the want of foundation or legal conduct in any of its stages. It would be unprofitable to add other reasons for setting aside the inquisition. It is indeed impossible to sustain it against the fundamental objections that have been stated. But it may be added, that another commission cannot be issued by the court on the petition in this case, if such a thing should be desired. Pecuniary inconvenience is not that which the act contemplates as a ground for not appointing the trial at the party's residence. 16 Ves. Jr. 340. And here he resided on his farm in the county, actively, and as his neighbours testify, intelligently engaged in his proper vocation, unsuspected of any mental disorder, except by a few relations and others, who took their impressions from reports, or had their preconceptions from slight causes thus strengthened. In this condition he was surprised in Philadelphia, whither he had gone to sell his produce in the market, with the announcement that he was thought to be deranged—that he must abandon his affairs and go into confinement—and on the certificate of a physician who had not seen him for months, was made an involuntary inmate of the asylum at Frankford. Neither his health nor any known disposition to inflict injury on his friends or himself required such restraint as a measure of safety. Some occasional irregularities in his conduct are traced up from 1839 to 1847, and aggregated to found the fact of a distempered mind, and warrant this summary process; but at the time it was executed upon him he farmed well, made his bargains well, settled his accounts exactly, paid as punctually as most debtors, and had the good opinion of his neighbours, who, with few exceptions, esteemed him as a good housekeeper and farmer, as well as an intelligent citizen. A few of his acts may be considered blame-worthy, in the relation he bore to the parties complaining of them; but, on the testimony, they may well be ascribed to provocations which ought to have been avoided in his circumstances—at all events, one would think, it required but little charity to place them in the category of common occurrences in men's lives who are touched, as he is said to have been, with the infirmities of a nervous constitution. This seems to have been his misfortune, but the evidence does not satisfy the court that it affected his mind to any extent, for which an affectionate or discreet deference to his opinions and plans for a frugal husbandry, whilst the pressure of debt remained on him, would not have been the best remedy. His friends near him, however, thought otherwise; and had him declared a

lunatic, on the testimony of physicians, who, to say the least, give us but a vague account of the moral insanity under which they believed him labouring. It is not necessary, on the question now before the court, to examine into the truth of that finding for more than to see whether it was inconvenient, in a legal sense, to have removed him to his residence for the purpose of executing the commission. The petitioner may have considered it so in reference to the trouble and expense, merely, and doubtless acted on some such view of the case. But that is not the view of the law, in the judgment of the court, where the facts show the party in the condition of Mr. Hinchman. Inquisition and the proceedings in the case are therefore set aside by the court.

Heston *v.* Canal Commissioners.

[JANUARY 16, 1850.]

An injunction will not be granted against public officers acting under the authority of the state, to restrain them from taking private property for a public improvement, until suitable compensation shall be made, where a mode is provided by law for the assessment of the damages sustained.

IN EQUITY. Motion for an interlocutory injunction.

G. B. Browne, for complainant.
W. B. Reed and *E. K. Price*, for respondents.

The opinion of the court was delivered by

COULTER, J.—The bill sets forth that Morris Longstreth, Israel Painter, and James Powers, canal commissioners, entered upon forty acres of land belonging to the complainant, situate in the county of Philadelphia, which he occupied and used for gardening purposes, and by themselves and their agents, without authority of law, took a large portion thereof for public use, without having paid the complainant for the said land so taken for public use. The land so taken for public use, it is admitted, was used by the said commissioners for the purpose of constructing the railway round the inclined plane, west of the river

Schuylkill. This is a great public work, in which all the citizens of the commonwealth are interested, inasmuch as it will increase the travelling upon, and consequently the revenue derived from the improvements in which the state is interested. It is moreover of great public importance to the agricultural and commercial interests of the state. The bill prays this court to grant an injunction, by which the said canal commissioners shall be enjoined from proceeding in this work, until suitable compensation shall be made to the complainant; that is, in fact, to grant an injunction against the state, by whose authority this work is progressing. Public policy requires that this work should be speedily completed. Granting an injunction is a matter of discretion with the court, and I think it would be an exceedingly ill-judged exercise of power to grant it in this instance. It is very true, that the state cannot take the lands of an individual for public use, without providing compensation. But the mode and manner of making that compensation, and of ascertaining its amount, is a legislative and not a judicial power. Since the commencement of the commonwealth, when, by authority of the state, roads have been made through the lands of individuals, the legislature has authorized the several county courts to appoint viewers to assess the amount of damages, if any. And now, by the authority of the statute, these viewers are directed to take into consideration the benefit which will accrue to the owner of the lands by reason of the improvement. The constitutionality of these acts has never been questioned by any judicial decision. Indeed, neither this court nor any other court has power to point out and direct the manner in which compensation shall be made; and it has been adjudged, that the party complaining is not entitled to a trial by jury, but that any other mode directed by statute is a compliance with the constitutional injunction. The state has provided a mode for making compensation to the individual in this case. The fifth sec-

tion of the act of 6th April, 1830, provides a mode of assessing damages done to individuals by the Pennsylvania canal or rail-way. This improvement is not, and could not be named in that act. But it would seem that the two acts ought to be construed together, being *in pari materiâ*, and in relation to improvements made by the state, and under the direction and control of the canal commissioners. By that act, taken in connexion with the act of 2d July, 1842, § 3, the damages are to be assessed by the canal commissioners in case of injury to private property. And these functionaries have acted in the present improvement on the basis of these two acts; for, by their report, it appears, that they assessed the damages occasioned by the whole improvement at $27,000, a sum which is more than covered by the appropriation made by the legislature, including the cost of completing the work. But if the legislature should be of opinion that the acts of assembly I have indicated do not fully cover the complainant's case, as his counsel seems to doubt, and if the representations made here as to the magnitude of the injustice which will be done to the individual complainant are properly sustained before that body, they may perhaps grant him relief. It is not the interest, and certainly not the duty or inclination of the state, to injure an individual by taking his private property for public use without suitable compensation. I cannot grant the injunction; the bill is therefore dismissed.*

* Where private property is taken for public use, it is not necessary that the compensation to the owner required by the constitution should be actually ascertained and paid before the property is appropriated, but it is sufficient if an adequate remedy is provided by which he can obtain compensation without any unreasonable delay. *Pittsburgh* v. *Scott*, 1 Barr 309. An act which authorizes the taking of private property for public use, is not void merely because it contains no provision for compensation; if compensation is actually made in any way, or if the legislature shall, by a subsequent law, direct it to be done, the law may be valid. But until such provision be made, and the compensation secured, an injunction will be granted to restrain the company from entering under the law. *Bonaparte* v. *The Camden and Amboy Rail-Road Co.* 1 Bald. 205.

Kennedy *v.* Way.

[MARCH 23, 1850.]

Though a party driving on a public road should lose all control of his horse, and an injury ensues in consequence, yet if the jury believe that the loss of control was the result of the defendant's prior fault, the plaintiff may recover.

Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a public highway, is unlawful; and if death ensues from a collision thus produced, without fault of the injured party, the offence, it seems, would be murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.

In an action of trespass against the master of a horse for a collision, it is for the latter to show that he was not in fault.

Where a collision occurs on a public road, if the jury believe the defendant was engaged at the time in a trial of speed with a third party, the jury may give exemplary damages.

Where the court charged the jury that they might give exemplary damages, which the jury declined to do, and found damages which the court thought much too small, the court, nevertheless, refused an application to grant a new trial, holding that the question of damages was one for the jury, with which the court could not meddle.

Two actions of trespass were brought, one by the plaintiff, and the other by the plaintiff's wife, for damages sustained by a collision in Broad street. The plaintiff, with his wife, were in a wagon, and were struck by the defendant's wagon, which latter, at the time, was going at the rate of a mile in four minutes. There was some evidence to show that there was at the time a trial of speed between the defendant and a third person; but this was disputed by the defendant, who maintained that his horse had run away with him, and that it was entirely out of his power to control it. The plaintiff's wagon was broken, and his wife thrown to the ground, though she sustained no material injury. It came out incidentally, that Broad street, between the Germantown Road and Green Hill, had become

a sort of racing course for fast trotting horses, of which, it was alleged, the defendant's was one; and it appeared that in the afternoons the habit had become so settled, as to expose passengers to much danger.

Rogers, J.—In charging the jury, said, that the case was very important to the defendant, and to the public, though the plaintiff had but little pecuniary interest in it, operated upon, as he seems to have been, by higher motives. The counsel had discharged their duty, and it now devolved upon the court and jury to do theirs. There are two actions—one for injuries to Mr. K., the other for injuries to Mrs. K., and these two were necessary, and therefore Mr. K. is not obnoxious to censure on that account. It was alleged that these injuries were produced by the illegal, careless and improper conduct of the defendant; and, after reviewing the facts, the judge continued: It is for the jury to say, how did the accident arise; was it from the improper conduct of the defendant; or was it from causes over which the defendant had no control?—and of this the burden of proof is upon the defendant, and it is for the jury to examine how far these excuses will avail him. If a horse runs away, without the fault of the driver, he is not answerable; but he must show he was not in fault. The judge here commented upon the testimony of the witness, with whom the plaintiff's counsel alleged Way was running at the time of the accident, and expressed his surprise at the neglect to call a witness who could have told all the particulars.

But, admitting that a short time before this disaster the defendant lost all command of his horse, and could not stop him, yet if that was produced by the previous fault of the defendant, he is responsible for all results directly or indirectly flowing from it. Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a public highway, is dangerous, and in itself unlawful; a fast trotting

horse is a pretty plaything, but it is expensive, and to be used in its proper place, but not for the public highway; the public are not to be endangered by lawless, dangerous and improper sports, and where loss of life is occasioned by such, the offence is homicide, manslaughter or murder of the second degree—both being the subjects of penitentiary punishment. There are two questions:—First, was the accident produced by defendant's improper conduct? On this you can have but little difficulty, I think. Second, as to the amount of damages. The plaintiff ought to have ample compensation for all injury to himself and wife, and to his property. If the defendant was engaged in a trial of speed, the jury may give exemplary damages, large and heavy; and the judge advised the jury to give such, as well to compensate the plaintiff as to punish the defendant. He has been fined $100 by Judge Parsons, and for this the jury may give credit, if they think proper. If he was trying to stop his horse at the time, the damages should be mitigated. A great deal has been said about the plaintiff's motives; they do him no manner of discredit. Those who indulge in these things should recollect that, though it may be sport to them, it may be death to others.

The jury found a verdict of $75 for the plaintiff in each case.

A motion was made by the plaintiff for a new trial, which was submitted, without argument, by *H. M. Phillips* and *W. B. Reed*, for the plaintiff, and *G. W. Barton* and *Clarkson*, for the defendant.

Rogers, J.—Said, he did not agree with the verdict. He thought the damages ought to have been heavier, and he was surprised at the result. The question of damages, however, was one for the jury, which he would not meddle with. It might have been that the jury considered the punishment in the quarter sessions as sufficient punishment. The case ought to be a warning to all persons who make

a practice of fast driving in the public streets. If death had ensued in consequence of this collision, the perpetrator would have been held guilty of murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.*

Com. ex rel. Irvin *v.* Penott.

[NOVEMBER 24, 1849.]

A *minor* sister is incompetent to act as next friend in the binding of her brother as an apprentice.

An indenture of apprenticeship which does not contain a covenant to give the apprentice a reasonable education is void.

THIS was a *habeas corpus* sued out by the apprentice, Irvin, to test the validity of his indentures to the respondent. The indenture was executed by his sister, as his next friend, who, at the time, was under twenty years of age; and it contained no covenant for schooling.

Doran, for relator.
Wollaston, contra.

ROGERS, J., decided,—1. That a minor sister cannot bind her brother as an apprentice. 2. That an indenture of apprenticeship which does not contain a covenant to give the apprentice a reasonable education, is void. It is the business of the master, when he takes an apprentice, to look to this essential part of the contract, and to pro-

* In the case of *The Europa*, DR. LUSHINGTON said, that "if a steamer went from twelve to fourteen knots an hour through anchorage ground, where from two hundred to three hundred vessels were lying, and a life was lost, it would be manslaughter." 2 U. S. Law Mag. 500.

vide for it in the indenture, when the education of the apprentice has been previously neglected. Masters that do not do this, must blame themselves if the boys are discharged. In the case now before the court, the boy was totally uneducated, and therefore Penott should have stipulated in the indenture for his schooling; and as he did not do so, the binding is invalid, and the boy must be discharged. Apprentice discharged.*

* It is not necessary that the person who acts as *next friend* in the binding of an apprentice, should receive an appointment as such from legal authority. *Com.* v. *Roach*, 1 Ash. 27. A sister may act as next friend, even though a *feme covert*, and the binding be to her own husband. *Com.* v. *Leeds*, 1 R. 191. Where the parent of a child lives at a distance, and has long relinquished the protection of the child, a binding by the next friend is good; but the master to whom the child was formerly bound is not such a friend as is within the meaning of the act of assembly. *Com.* v. *Kendig*, 1 S. & R. 366. A *mother*, although married to a second husband, is a *parent*, within the meaning of the act, and may, as such, independently of her husband, give assent to an indenture. *Supplee's Case*, 6 S. & R. 340. An indenture of apprenticeship is not necessarily invalid, because the father of the apprentice is in full life, and the binding made without his consent. *Com.* v. *Coxe*, 1 Ash. 71. But, where the father is living with the mother, to make a valid indenture of apprenticeship, the assent of the father, before the magistrate, at the time of the binding, expressed in writing, is necessary; the assent of the mother is not sufficient. *Com.* v. *Crommie*, 8 W. & S. 339. The general practice is, for the next friend of a minor to express his assent by sealing the indenture; but it has never been supposed that he thereby rendered himself liable on the covenants of the indenture. *Com.* v. *Leeds*, 1 R. 191; *Leech* v. *Agnew*, 7 Barr 21.

An indenture may be valid without any covenant for schooling at all, if it should appear that the education of the apprentice had been sufficiently attended to before. *Com.* v. *Leeds*, 1 R. 191, GIBSON, C. J.

Lessig *v.* Langton.

[March 6, 1850.]

On a motion for a special injunction, where the defendant's answer is filed before the day of hearing, it is to be considered as an application after answer to the bill.

Where the application is for an injunction, upon affidavit, before answer, upon the ground of apprehended irremediable injury, the court will hear counter-affidavits until satisfied with the information offered; and the course is the same where the application is to issue an injunction, before answer.

But if the defendant has filed his answer, no affidavits can be read to contradict it.

The exceptions to this rule are cases of waste, and of partnership, when it is made clearly to appear that one partner, by acts of extreme misconduct is bringing the subject of the partnership within the principle of irreparable mischief, and so making the case analogous to waste.

They are permissible only to show fraud, mismanagement or improper conduct in the acting partner, or to show actual or threatened waste, but never to show title in the plaintiff, or the fact of partnership.

If a partner pledge his whole time for the joint benefit, and subsequently acquire property by his individual exertions in other business, the remedy of his co-partner is not by bill for an account, but by action for breach of covenant.

Equity will in no shape lend itself to assist a gambling transaction, or in any way to vindicate a contract of which gambling is the object.

In Equity. Motion for an injunction.

The bill set forth that the complainant and defendant, in January, 1849, entered into partnership, in the digging of gold, and carrying on other business, in California. That under this agreement they sailed from Philadelphia, and in due time arrived at St. Francisco. That they carried on business there for several months, and were so successful, that they made and became possessed of gold, to the value of $20,000 and upwards. That the partnership was dissolved by agreement, whereby each of them became entitled to a moiety of the profits. That at the time of the

dissolution the defendant had in his possession nearly the whole of the partnership property, consisting of gold dust, &c., and while complainant was sick in one of the hospitals of California, the defendant left the territory and carried off with him the partnership property; and after his arrival in Philadelphia, deposited about $18,000 in gold, in the mint of the United States, for the purpose of being coined, and has disposed of the remainder of the partnership property. That the firm is not indebted, except in $500 for borrowed money. That defendant has been repeatedly called on by complainant's father and agent, to whom it was agreed by both of the partners that all remittances to this country, on their behalf, should be made, to give an account of complainant's property in his hands and to pay over the same, or deposit the same in some safe place, or to invest the same for complainant; but defendant denied having any gold with him except a few hundred dollars, and has made other untrue statements in relation to the business, and has refused to give any account of the assets of the firm in his hands, but intends to defraud complainant and to appropriate the whole of the assets to his own use; and in order to avoid a recovery, is now proposing, after turning the gold into coin, to leave the jurisdiction of the court, and to carry off the said property. The complainant therefore prayed for an account, and the appointment of a receiver, and that the defendant might be restrained by injunction from receiving or transferring any of the partnership effects, particularly the gold deposited in the mint of the United States.

At the time of filing the bill the complainant's counsel moved for a special injunction to restrain the defendant from assigning or transferring the gold deposited in the mint of the United States, or any other gold, the property of the partnership, and the certificate of deposit thereof.

On the following day, the defendant filed his answer, denying that there ever was any partnership between the

complainant and defendant, and all the other facts set forth in the bill.

Depositions were taken on behalf of both the parties, the result of which sufficiently appears in the opinion of the court.

The motion for a special injunction was argued by *Cumming*, for complainant.

BELL, J.—I am satisfied the motion for an injunction must be dismissed. An answer having been filed, before injunction granted, it must now be considered as an application after answer to the bill.

It is not like *Morphett* v. *Jones*, 19 Ves. 351, where, upon motion for an injunction, the defendant asked that it might stand over, that he might file affidavits in opposition to it, but instead thereof filed an answer. Lord ELDON said, in such a case, he would look at the answer as an affidavit, and allow the original one to be read. Nor is it like *Glassington* v. *Thwaites*, 1 Simons & Stuart, 134, where the motion stood over, on motion day, for want of time, and in the mean time the defendant put in his answer, in which Lord ELDON declared the practice in such cases to be, to regard the answer as a counter affidavit, and he allowed affidavits put in before the motion day to be read in answer.

This case is then to be governed by the rules of practice which obtain in motions for injunction after answer. Where the application is for an injunction upon affidavit, before answer, upon the ground of apprehended irremediable injury, the court will hear counter affidavits until satisfied with the information offered: and the course is the same where the application is to issue an injunction before answer. 2 Dan. Ch. Pr. 356. But if the defendant has filed his answer, then it is a general rule that no affidavit can be read to contradict it; for where the answer is full, and denies all the circumstances upon which the

equity is founded, it has become the universal practice, with reference to an injunction, to give credit to the answer. The plaintiff is strictly tied down to reading the answer in support of his case, whether the motion be for an injunction, or upon the merits against dissolving a common injunction.

A contrary determination made by BULLER, Judge, in *Isaacs* v. *Humpage*, 1 Ves. Jr. 427, 3 Bro. Ch. 463, has been repeatedly overruled; Eden on Inj. 108; 2 Dan. Ch. Pr. 289; *Norway* v. *Rowe*, 19 Ves. 150. And so firmly is the practice settled, that in *Clapham* v. *White*, 8 Ves. 36, the chancellor said that though five hundred affidavits were filed, not only by the defendant, but by many witnesses, not one could be read to overthrow the answer.

It is true, the rule is open to exception in case of waste, from the strong desire the court of chancery has always felt to prevent irremediable injury to lands. *Countess of Strathmore* v. *Bowes*, 2 Bro. Ch. 88; S. C. 1 Cox 263; S. C. 2 Dick 673; *Robinson* v. *Byron*, 1 Bro. Ch. 588.

And, after considerable hesitation, the exception was extended to cases of partnership, where in principle these are analogous to waste. But this is admitted with great caution, and the reading of affidavits is only admitted when it is made clearly to appear, that one partner, by acts of extreme misconduct, is bringing the subject of the partnership within the principle of irreparable mischief, and so making the case analogous to waste. They are permissible, in refutation of the defendant's answer, only to show fraud, mismanagement or improper conduct in the acting partner, or to show actual or threatened waste; but never to show title in the plaintiff, or the fact of partnership denied. *Strathmore* v. *Bowes*, 2 Bro. Ch. 74, in note; *Charlton* v. *Poulter*, cited in *Norway* v. *Rowe*, 19 Ves. 148; *Peacock* v. *Peacock*, 16 Ves. 49; *Lawson* v. *Morgan*, 1 Price 303; note to *Hanson* v. *Gardiner*, 7 Ves. 305–6, Am. Edition. In the last case, the Chief Baron said, in the case of an application against an acting partner, to bring it within the

principle of waste, or irreparable injury, it should be shown the partner is insolvent, or at least in embarrassed circumstances, in which case alone can there be any pretence for reading affidavits in contradiction of an answer; it can only thus be brought within the analogy of waste: and GRAHAM, Baron, said, the interposition of the courts is an arbitrary measure, and the courts have always voluntarily interposed, conscious that by such attempts to prevent mischief, they must often cause it.

Now, in the present case, the allegation of misconduct in the defendant, consists in improperly carrying off the partnership funds from California, his refusal to account, or pay over, or secure the moiety of his copartner, (although this, undoubtedly, would be no ground, of itself, for an injunction) falsehood and concealment of the truth, originating in an attempt fraudulently to appropriate the whole fund to himself, and his intention to depart the commonwealth to avoid accounting.

But all this is explained and fully denied, and the affidavits exhibited by the plaintiff do not contradict the answer in this particular: indeed, so far as they go, they rather sustain it. They profess, however, only to prove the alleged partnership, and for this purpose they are incompetent, and should not have been read.

Then, upon the other objection. Even where admissible to contradict the answer, they can only be read where they are filed before the answer is put in. They cannot be made use of, if filed after answer; *Lawson* v. *Morgan*, 1 Price 303, and books of practice. But the affidavits upon which the plaintiff principally relies were filed after the answer put in, and consequently, for purposes of contradiction, are valueless. These being out of the way, there is no proof of partnership, upon which he can proceed.

Suppose, however, I am at liberty to look into the affidavits: the weight of the evidence is, that if a partnership ever existed, it was dissolved by mutual consent, before the

parties reached California. Nay, the depositions taken on behalf of the defendant, exhibit a state of facts utterly irreconcilable with the idea of partnership.

But the objection is interposed, that the answer wholly denies partnership, and does not aver dissolution, by which, it is supposed, I am precluded from decreeing on the ground of dissolution, before reaching the point where the business of the partnership was to commence. If this be so, and we take the partnership as established by the witnesses for the plaintiff, the question is presented—where is the proof of misconduct or mismanagement on the part of the defendant? If there was a partnership, there is nothing improper in the defendant's being in possession of the partnership property: he may even dispose of it for joint benefit. That he refuses to account is no ground for an injunction. But even this is not proved; nor does the evidence disclose misbehaviour in any other particular, much less, such as must call for a preventive extraordinary remedy.

But, again, should we concede this difficulty out of the way, and full proof of partnership? The bill alleges the partnership to have been for the purpose of digging gold, and the plaintiff's evidence tends to establish this. It is certain, if it existed at all, it was either for that purpose, or to make gain by gambling. Either way is fatal for the prayer for an injunction. If it was for the former purpose, then it is plain, under the proofs, the fund now held by the defendant was acquired, not in pursuit of the partnership business, but by the private and individual occupation of the defendant. It is, consequently, not partnership property. It will not do to answer, that the defendant having pledged his whole time for the joint benefit, he must account for all he acquired while otherwise occupied. In the first place, there is no evidence of such agreement, and secondly, if there was, the remedy is not by bill for an account as a partner, but action for breach of covenant. If the partnership was for the purpose of gambling, it is clear, equity

will in no shape lend itself to assist a gambling transaction, or in any way to vindicate a contract of which gambling is the object. 1 Story's Eq. § 303; *Harrington* v. *Bigelow*, 11 Paige 349.

In no aspect of this case is the plaintiff entitled to an injunction, and the motion for one must be dismissed. As the proof now stands, he cannot have an account, but this we are not now called on to decide.

Interlocutory motion for injunction denied.*

* Where a number of individuals formed an association, for a specified term, to engage in mining for gold in California, and one advanced money, and the others agreed to proceed to the mines, and engage in the digging for gold; but when they arrived, the capital advanced being exhausted, and all abandoned the enterprise as fruitless, and two of them engaged in another and different employment of their labour; it was *held* that the associate who advanced the money had no specific lien on the profits produced by such labour, as could be enforced in a court of equity: his remedy, if any he had, was by an action for damages against those who abandoned the association. *Waring* v. *Cram*, 1 Pars. Eq. Cas. 516.

Sedgebeer *v.* Moore et al.

[November 30, 1850.]

In an action to recover damages for a *tort*, the defendant may be held to bail notwithstanding the act of 1842, to abolish imprisonment for debt.

Although, where the plaintiff has an election to bring his action either in contract or *ex delicto*, he cannot, by such election, deprive the defendant of any substantial privilege or defence; yet this rule does not apply where the action is to recover damages for a *tort*, distinct and independent of the contract.

Therefore, a defendant may be held to bail in an action of deceit.

Quere, whether, under the act of 1842, even in cases of contract, the court has not a discretion to hold to bail on proper cause being shown; as that the defendant is about to abandon the country without leaving property to meet the debt.

The court will not discharge on common bail for a mere interlineation in the affidavit.

[Sedgebeer v. Moore.]

THIS was an action on the case. On the application of the plaintiff, the defendant, Theodore M. Moore, was held to bail in four thousand dollars.

The affidavit to hold to bail alleged, in substance, that the defendant, Theodore M. Moore, being indebted to the plaintiff in the sum of $8,365,18, fraudulently induced him to agree to a compromise of his claim, by waiving the sum of $3,365,18, surrendering the evidences of the former debt, and releasing him from all other liability, on the latter confessing a judgment for $5,000, to be paid in quarterly instalments of $250, which judgment was accordingly confessed; that it was expressly agreed between the parties, that payment in cash was to be the basis of the compromise, which, without this, would not have been agreed to; that the said Theodore M. Moore, afterwards alleging his inability to pay cash, with an intent to cheat and defraud the plaintiff, represented to him that if he would receive from him, in lieu of cash, a draft on Cadwallader C. Moore, residing in Cincinnati, it would be paid at maturity, knowing this not to be true, and that the said Cadwallader C. Moore was not to be trusted; that the plaintiff accordingly received as cash for one instalment on the judgment, such a draft, accepted by C. C. Moore, for $250, and that this draft was protested at maturity for non-payment. The affidavit also alleged that the defendant, Theodore M. Moore, was only a sojourner in Pennsylvania, and was about to remove out of the jurisdiction of this court.

The defendant now asked to be discharged on common bail, on the ground that the act of 1842, abolishing imprisonment for debt, had taken away the right to a *capias* in such case, and also that the affidavit contained an interlineation. He likewise filed counter affidavits, but the court declined to hear them.

E. S. Miller and *T. Sergeant* for the motion.
B. Rush and *D. P. Brown*, contra.

[Sedgebeer *v.* Moore.]

ROGERS, J.—On the application of the now plaintiff, and affidavit filed, a special order was made to hold the defendant to bail in the sum of four thousand dollars. The point now in controversy arises on a rule to show cause, *non obstante* the order, why Theodore M. Moore, who was arrested, should not be discharged on common bail.

If this was an action to recover money due upon a judgment, or decree founded upon a contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, a serious question might arise, whether bail, in any event, or under any combination of circumstances, could be exacted from the defendant. It is represented to be the understanding of the profession, in this section of the state, that it cannot; but, although their opinion is undoubtedly entitled to great respect, yet I know of no case where the fact has been judicially determined. It may, though, be considered, when a proper case arises, as a question open to discussion. Previous to the passage of the act of the 12th July, 1842, (the language of which is cited above) to abolish imprisonment for debt and to punish fraudulent debtors, bail, as a matter of course, was required in all cases of contract, or others brought for the recovery of debts. This was the general rule; but it may, perhaps, admit of doubt (giving the act a reasonable construction, which we are bound to do) whether the legislature intended any thing more than to abolish the rule in the first instance, as to residents, afterwards extended by resolution to non-residents, leaving it, however, to the discretion of the courts, on cause shown, to allow a *capias* and hold the defendant to bail, as in case of *tort*, when it manifestly appears that such process is necessary to enable him to reap the fruits of any judgment which he may afterwards obtain. Is the rule general, or is it universal, embracing all possible cases in the point of difference? It is not my purpose to deny that to justify the interposition of the courts, a strong case must be pre-

sented, but I am unwilling to admit that the words of the act require so stringent a construction as to compel the court to permit flagrant injustice. Were this only a case of contract, and it should satisfactorily appear that the defendant was about to abandon his country without leaving property to meet the debt, I should hesitate long before I would undertake to discharge him on common bail, thereby endangering, or perhaps destroying all means of recovering a just debt; enabling a dishonest debtor to elude the just claims of his creditors.

But, be this as it may, this is not a case of that description. The suit is not brought on a contract, but for a fraud committed by the defendants, for which, as is contended, the proper remedy is an action of deceit. It is, therefore, not included in the act of the 12th July, 1842, which merely abolishes imprisonment in actions on contracts, leaving *torts* in the same situation as to the remedies, as before the passage of the act. If considered as a *tort*, it cannot be doubted the plaintiff is entitled to bail on the special cause shown, as in this case, where there is reasonable ground to believe that the defendant is about to withdraw himself beyond the jurisdiction of the court. On this head the affidavit is full and explicit. The plaintiff deposes, that the defendant who has been arrested is a mere sojourner in this state, without any fixed occupation or permanent abode, and that there is every reason to believe, and that he does believe, that unless he is held to bail, he will place himself beyond the jurisdiction of the court, and thereby escape the responsibility of this action. If these facts be true, (and I must take them to be so, as I cannot look beyond the affidavit itself,) bail is necessary to protect the honest claims of the plaintiff. It is, however, urged, that this suit is, in substance, but another mode of enforcing the performance of a contract, and that the election of the plaintiff in cases of this character, to proceed in an action in form *ex delicto*, cannot deprive the defend-

ants of any substantial privileges on the defence; that the mere form of the remedy cannot alter the right. For this position the defendant cites *Penrose* v. *Curren*, 3 R. 350; *Brown* v. *Treat and Carter*, 1 Hill 225; and *Bowen* v. *Burdick*, 5 Penn. Law Journ. 114. The principle on which these cases are ruled, it is not my purpose to controvert. I agree that when the suit is on the contract, or recognises its validity, the mere form of the action will not be allowed to govern the right; but I deny the application of the principle to the case in hand. This is not the case of a difference in the form of action, but suit is brought to recover damages for a *tort*, distinct and independent of the contract. The plaintiff repudiates the agreement, alleging that it is no contract at all, because he was induced to enter into it by such fraudulent practices as entitled him to hold the defendant accountable in an action of deceit.

When a person is induced by fraud to enter into an agreement, the party defrauded may either repudiate the contract by action sounding in *tort*, or he may, if he chooses, make it valid by commencing suit upon it. If he adopt the latter course, as he may, the defendant cannot be held to bail, unless, as before observed, under peculiar circumstances; but where he pursues the remedy in *tort*, I cannot perceive any objection, in a proper case, to hold him to bail. This action is totally distinct and independent of the contract. The bargain is disregarded by the party wronged. He goes for the fraud, and what right has the fraudulent party to call to his aid the repudiated contract to enable him to escape arrest, and thereby consummate his own fraud? A., by force, takes the horse of B., which he sells to C., and receives the purchase money. B. has the right to sue A., the wrong-doer, either in trespass or for money had and received. He may elect either trespass or case. If he elects the former, he may hold A. to bail; if the latter, he cannot hold him to bail. This will be conceded; and therefore it is clear that whether A. is

entitled to be discharged on common bail may depend on the form of the action the plaintiff chooses to adopt. If he elects to sue for the *tort*, in a proper case, as this is shown to be, the defendant may be held to bail. In this stage of the proceeding, on a motion to discharge the defendant from arrest, it is not my intention to enter into the merits of the case, nor shall I permit the facts disclosed in the counter affidavit to have the slightest influence. Whether an action of deceit is the proper remedy, it would be wrong now to determine; because, if the decision should be erroneous, an injury may be committed without the possibility of redress; whereas error on the trial may be corrected by a higher tribunal. If there be error, let it be one that may be redressed. That the affidavit is interlined, is an objection not worthy of serious notice.

The motion to discharge on common bail is overruled.*

* The New York act to abolish imprisonment for debt does not apply to suits founded in *tort*, though a contract between the parties is alleged by way of inducement. *M'Duffie* v. *Beddoe*, 7 Hill 578. Therefore, where there has been a wrongful conversion of goods, the defendant may be held to bail, in whatever way the property came into his possession. *Suydam* v. *Smith*, 7 Hill 182. The case in the text appears to conflict, in some degree, with *Bowen* v. *Burdick*, 5 Penn. L. J. 113, decided by the district court for the city and county of Philadelphia; but the rule to be deduced from all the cases appears to be this; that where the plaintiff has his election to bring his action either *ex contractu* or *ex delicto*, as in case of a common carrier or other bailee, there the defendant shall not be subjected to imprisonment in consequence of the mere change in the form of action. But where the action is for a distinct *tort*, although one deducible from the existence of a contract, if the plaintiff disaffirms the contract and proceeds for the fraudulent or tortious conduct of the defendant, in such cases bail may be demanded in the first instance. *Tryon* v. *Hassinger*, 2 Penn. L. J. 43.

It has been determined by the United States district court for the southern district of New York, that the non-imprisonment act of that state, in connexion with the acts of congress of the 28th of February, 1839, and 14th of May, 1841, (4 Laws U. S. 321, 410,) does not extend to process issued by the admiralty courts. *Gardner* v. *Isaacson*, *Gaines* v. *Travis*, 3 Am. L. J. 193, 199.

Skilton et al. *v.* Webster et al.

[JANUARY 11, 1851.]

A court of equity will entertain jurisdiction to compel the trustees of a church to permit clergymen who adhere to the principles of the church, with which they are in connexion, to minister to the congregation in the church edifice, and to appropriate the profits to the support of such ministry, without regard to the comparative numbers of the respective parties in the congregation.

It is not sufficient, to oust the jurisdiction of a court of equity, that the complainant has a remedy at law; unless that remedy be full, complete and adequate.

The decisions of ecclesiastical tribunals, in all cases on doctrine, order and discipline, are conclusive in the common law courts.

When it appears that property is dedicated to support peculiar tenets, but not to support such tenets in connexion with a particular church government, then it is not subject to any ecclesiastical power which upholds those tenets.

Where property is dedicated to support peculiar tenets, *primâ facie*, it is subject to the jurisdiction of the ecclesiastical courts; and if the parties wish exemption from their jurisdiction, it is necessary for them to show clearly that such was the intention of the founders of the church; particularly, as applied to a presbyterian church.

Extraneous evidence and circumstances may be resorted to, in aid of a doubtful construction, but it cannot be legitimately used to control the obvious meaning of the language which parties have chosen to employ.

It is one of the fundamental principles of all presbyterian churches, that presbyterian church government is a divine institution.

A dedication of property for the use of a congregation who should adhere to the religious principles agreed to at Pequa, in 1784, is subject to the jurisdiction of the ecclesiastical courts of the associate presbyterian church.

The right of secession is an inherent and distinctive principle of the associate church.

In case of secession, the minority of the church are not entitled to any portion of the property, although they may be numerically the majority of a particular congregation, and remain in possession.

The associate church does not recognise so absurd a principle, as that any members at their mere will and pleasure have the right to secede from the majority, and by such act, to become, or continue to be, the true associate church, and to take with them the particular property of which the separating minority may happen at the time to have the possession, and to hold it against the will of, and to the exclusion of the majority.

[Skilton v. Webster.]

THIS was a bill in equity filed by Robert Skilton and others, members of the church incorporated (on the 10th of May, 1802,) as "The Associate Congregation in the City of Philadelphia," and known as the First Associate Presbyterian Church of Philadelphia, in the state of Pennsylvania, adhering to the religious principles of the associate presbytery of Philadelphia, formerly, now the associate synod of North America, for themselves and all other members of the said church and congregation, who adhere to the standards thereof; against the trustees of the said corporation, certain ruling elders thereof, the Rev. Chauncey Webster, claiming to be its pastor, and the corporation itself.

The bill set forth that about the year 1754, a denomination of Christians was organized as a church in Pennsylvania, called "The Associate Church of North America," under the superintendence of the associate synod of Scotland; and, about the same time, the several congregations in this state, by the authority of said synod, constituted a presbytery, styled "The Associate Presbytery of Pennsylvania." That the congregations of said church having largely increased, the said associate presbytery was divided, one of the said divisions being the associate presbytery of Philadelphia; and other presbyteries, from time to time, were added, the number at present being fourteen. And that in the year 1801, a synod was duly constituted and organized by said associate church, as the visible head and supreme judicatory of said church in North America, and styled "The Associate Synod of North America," to which all the presbyteries and congregations owe obedience; and all ecclesiastical subordination to the associate synod in Scotland was abolished about the year 1817.

That about the year 1790, in the city of Philadelphia, certain persons professing the principles of the associate church, as set forth in the books hereinafter mentioned,

were duly organized as a congregation, under and subordinate to the said associate presbytery of Pennsylvania, and called the associate presbyterian church; and since the year 1801 said congregation has belonged to and formed part of the associate presbytery of Philadelphia.

That the term "congregation," in the associate church, means members of a local church in full communion, and their children.

That the established judicatories of the associate church are sessions, presbyteries, and a synod. That an appeal lies from the session to the presbytery, and from the latter to the synod. That the session consists of the minister and ruling elders of a congregation. It has the general management of the spiritual government of the congregation, but has no authority to place a minister over it, of its own mere will. A presbytery consists of all the ministers within a given district, and of one ruling elder from each pastoral charge. It has, among other things, the power of ordaining, installing, and removing ministers within its bounds; of trying, convicting, and punishing ministers, by suspension, deposition, excommunication, or other censures of the church—of visiting congregations—and generally of ordering whatever belongs to the spiritual welfare of the churches under its jurisdiction. The synod is the supreme judicatory, consisting of all the ministers, or of a delegation, from each presbytery, and of a ruling elder from each pastoral charge. It has the power, among other things, to decide upon appeals from the presbyteries—to redress any act of theirs contrary to order—to judge in controversies respecting doctrine and discipline—to bear testimony judicially against error in doctrine or immorality in practice—to declare the office of any minister vacant upon affirming the act of any presbytery deposing such minister—and generally to take care that inferior courts act in conformity with the word of God, and the standards of the said church.

That the associate synod of North America is the

supreme judicatory of the associate church in North America, and its decisions are final and obligatory.

That there is a sentence of suspension used by the judicatories of the said church for the discipline thereof, which may be either for a limited time, or indefinite, and may be inflicted either upon private members or officers, and in respect of the latter, it is a judicial exclusion from the exercise of office and from sealing ordinances.

That in the year 1784, the associate church of North America adopted and published a particular statement of their principles, in a book called and known as "The Declaration and Testimony of the Associate Church of North America." It was set forth and agreed to at Pequa, on the 25th day of August, 1784. These principles require, among other things, every member admitted to communion to declare and profess adherence to the Westminster confession of faith, the form of presbyterial church government, &c., as these are received and witnessed for by the associate church in her said declaration and testimony; and every officer, whether minister or elder, vows, at ordination, to avoid every divisive course, and to submit himself to the church courts, and every minister promises to be submissive to the presbytery, as subordinate to the associate synod of North America. These principles are now the principles of said associate church.

That in the year 1802, William Marshall, and others, then members of said associate presbyterian church of Philadelphia, and citizens of the commonwealth, applied for and received a charter of incorporation from Pennsylvania, for themselves and such others as should thereafter become members of said congregation being such citizens, and adhering to the religious principles expressed in the before mentioned declaration and testimony, agreed to at Pequa, as aforesaid, by the name, style, and title of "The Associate Congregation in the city of Philadelphia," with the usual privileges of such bodies politic. That before and

since the said incorporation the temporalities of the said congregation were committed to the care of a board of six trustees, two of whom are elected annually, on the first day of each year, by the pew-holders in said church.

That subsequently to the organization of said church in Philadelphia, viz., on or about the 24th day of August, 1790, David Clark and William Young, both members of said congregation, purchased, for the use of the same, a lot of ground on the north side of Walnut street, between Fourth and Fifth streets, being 36 feet 10½ inches wide, by 124 feet deep—and shortly afterwards there was erected on part of said lot a brick house, for the public worship of God, which was paid for out of the funds of said congregation, and the residue of the lot was appropriated for a burying ground; and a perpetual trust was declared of and concerning the said house of worship and burying ground, as follows, viz., "that the said church and lot of ground are held in trust for the associate congregation in the city of Philadelphia, who adhere to the religious principles expressed in a declaration and testimony for the doctrine and order of the church of Christ, agreed to at Pequa, the 25th of August, 1784, by the associate presbytery of Pennsylvania. That the said congregation may assemble in the said church for public worship, from time to time, for ever, and use the said burying ground for interring their dead."

That on the 2d day of August, 1802, John Cummings did sell and convey unto the said corporation in fee, two lots of ground on the west side of Thirteenth street, south of Spruce street, as an additional burying ground for the use of said congregation—that the lot on which the house of worship is erected is worth about $15,000—the additional burying ground about $3,000—and that the furniture and fixtures of the church are worth about $500—and that the whole of said property is held in trust for the sole and exclusive purpose of being devoted to the support of teaching and preaching the gospel, and the administration of divine

ordinances in said associate congregation according to the aforesaid principles of faith and practice, discipline and government of said associate church of North America.

That according to said principles no minister under sentence of suspension is permitted to occupy the pulpit, or administer divine ordinances, in a congregation of said associate church, nor can any member thereof attend on the ministry of such suspended minister without violating his own vows. That by said rules and principles the trustees of a congregation have no authority to call or in any way procure a minister to preach or officiate therein. That a clergyman can only be called to the office of pastor by a call, signed by the elders and members of the congregation who are in full communion, addressed to the individual called, and presented to the presbytery to which said clergyman belongs—if the presbytery approve, the minister is ordained and installed by the presbytery—if this body disapprove, the person called cannot become pastor of the congregation. A temporary supply is granted by the presbytery upon the petition of the elders of the congregation.

The bill further states that in the year 1837, the said first associate congregation of Philadelphia called the Rev. Chauncey Webster, one of the defendants, to be their pastor, by a written document, in the usual form, and which set forth that the members of said congregation had acceded to the principles of the associate presbytery of Philadelphia, as subordinate to the associate synod of North America. That said call was delivered to and accepted by said Webster, through the said associate presbytery—and due proceedings being had, the said Webster was ordained and installed as pastor of said congregation, and thereupon vowed, among other things, to submit himself to the admonitions of said presbytery, as subordinate to the synod aforesaid—to maintain the unity and peace of the church, and to avoid every divisive course.

That said Webster continued to be pastor of said congregation, until the said presbytery, at a meeting duly convened at Carlisle, on the 8th day of October, 1845, adopted, in due form, and according to the discipline of said church, a libel against him for a series of misconduct on his part, viz., defamation, slander, divisive courses, contempt of authority, and falsehood. A copy thereof was duly placed in his hands, and he was cited to appear and answer the same at a meeting directed to be held in Philadelphia, in the session room of the church of which he was pastor, on the 2d Wednesday of November following, viz., the 12th. That prior to said meeting, viz., on November 11th, 1845, the said Webster did, in an open and public manner, decline the authority of said presbytery and synod, and deny them to be his lawful judges—and did, in conjunction with F. W. M'Naughton, and one or two others, at the session room aforesaid, assume to constitute themselves into the associate presbytery of Philadelphia, and excluded the presbytery from said session room. Whereupon said presbytery, in pursuance of its powers, and in accordance with the principles and discipline of said church, did suspend said Webster (in order to his trial) from the exercise of his ministry, and from the communion of said church, until he should give evidence of repentance; and he was duly cited to appear at the bar of said presbytery on the 3d Wednesday of December following, to answer for his said disorderly conduct, and also to answer said libel. Failing to appear at that time, although duly notified, said Webster was again cited to appear and answer as aforesaid on the 27th day of May, 1846, with notice that unless he did then appear, the presbytery would proceed to try his case as if he were present. Accordingly at said time, said Webster still declining to appear before said presbytery, that body proceeded to the consideration of the said charges against him, and in due course, found him guilty thereof, and proceeded to and did pass upon him sentence

of suspension from the exercise of the office of the gospel ministry and from the communion of the associate church.

That when said Webster, M'Naughton, and others, did assume, in such disorderly manner, in the session room of said first associate church, to constitute themselves into the associate presbytery of Philadelphia, certain of the complainants, being present, did, for themselves and other members of said congregation, protest against said act, and did subsequently present their protest to the presbytery —which said body did legally and canonically adjudge and recognise the said protesters as the first associate congregation of Philadelphia. And the said associate synod of North America did afterwards, at a meeting duly held at Philadelphia, on the 6th day of June, 1846, upon consideration of said protest, which had been duly transmitted from said presbytery, legally and canonically adjudge that the said protesters, including the complainants, should be recognised as the true first associate congregation of Philadelphia, adhering to the principles of the declaration and testimony adopted at Pequa. And they are so recognised by the said presbytery and synod at present; and they aver that they are properly said congregation.

That the said Webster has not, at any time since his said suspension and excommunication, made submission to said presbytery, nor given evidence of his repentance, but has persisted and still does persist in exercising the office of pastor of said congregation, in defiance of the authority of said presbytery and synod, and that others of the defendants, M'Gonegal, Oliver Skilton, Donnelly, Auld, Totten, and Smith, trustees of said congregation, although duly notified of the premises, have permitted and do permit said Webster to occupy the pulpit, and officiate as pastor and minister of and in said church edifice, and sustain and uphold him therein, and have rented and otherwise appropriated the pews in said edifice to the exclusion of the complainants and others who adhere to the said presbytery and

synod, and claim to and do control all the property of said congregation, and have diverted it from its proper purposes by appropriating it to the support of said Webster, and of his ministrations as pastor, notwithstanding his suspension and excommunication, and to the use of themselves and others who do not adhere to the faith and discipline of said associate church. And the said trustees exclude clergymen from such church edifice who are in regular standing and full communion with said presbytery and synod, and also exclude the complainants unless they will consent to attend upon the ministry of said suspended and excommunicated minister.

All of which acts the complainants alleged to be contrary to the duty and trust as declared by the foregoing declaration of trust and deeds, and intended by the founders of said church, and contrary to the principles of the faith and practice, discipline and government of the said associate church, and to be to the injury of the complainants and others who are members of the said congregation, and adhere to the principles and standards of their church.

The bill stated the refusal of the defendants, after request, to perform their duty and trust, and after the interrogatory part, prayed for relief as follows,—that the defendants may be compelled to permit clergymen in full communion with said presbytery and synod, and who adhere to the principles and practice of the said associate church, to minister to the said congregation in said church edifice—that the trustees may be compelled to appropriate the property to the support of such ministry and none other,—that the trustees and said Webster may be compelled to account for the property since the time of his suspension—that the said trustees may be removed from office for their breach of trust, and others appointed in their stead, and that the books, papers, records, and property of said congregation be delivered to such new trustees—that said Webster may be restrained and enjoined from officiating in any way as

minister in said congregation, or from intermeddling with the spiritualities or temporalities thereof—and that the trustees and ruling elders be also restrained and enjoined from permitting the said Webster so to do—and from appropriating said property in any other way than for the support of a minister in regular standing and full communion as aforesaid, and settled according to the principles and practices of the associate church—and finally, from interfering with the occupation of said church edifice by the complainants and other members of the congregation who adhere to the said presbytery and synod, in order to the administration therein of divine ordinances according to the faith and discipline of the associate church.

The bill also contained a prayer for general relief, and for a subpœna and writ of injunction.

The answer denied that the complainants, or any of them, were, at the time of filing of the bill, members of the church or of the corporation called "The Associate Congregation in the city of Philadelphia," and proceeded to give an historical sketch of the associate church. That it was originally constituted in Scotland, in 1733, by four ministers who seceded from the church of Scotland, and constituted "The Associate Presbytery." In 1735, this presbytery issued its judicial testimony, and is averred not to have seceded from the doctrines or standards of the church of Scotland; and the fundamental principle of said secession, and one which the respondents hold, is stated to be, that whenever the majority depart from the established standards, either in doctrine or administration, or deny the liberty of bearing open testimony against prevailing errors, it is the duty of the minority to secede, and by so doing the seceders become the true church.

That in 1744, the associate synod was constituted in Scotland. In 1747, a division took place therein in reference to the burgess oath, and that portion of the synod, being the minority, and called the anti-burghers, withdrew,

and constituted themselves the associate synod. In 1788, this synod was divided into two synods, in subordination to one judicatory, called "The General Associate Synod." That in 1754, the associate presbytery of Pennsylvania was constituted, in subordination to the anti-burgher or associate synod of Scotland; and in 1788, this subordination was defined by the Scottish synod as no more than a spiritual union.

That in 1782, an attempt was made by the majority of the associate presbytery of Pennsylvania to unite with another ecclesiastical body, called "The Reformed Presbytery." The minority, consisting of two ministerial members, Messrs. Marshall and Clarkson, protested and appealed to the associate synod in Scotland, but the presbytery rejected their protest and appeal. Thereupon the minority withdrew, and organized themselves as the associate presbytery of Pennsylvania; and Mr. Marshall and his adherents formed the associate congregation in the city of Philadelphia, and became a component part of said presbytery. "The Associate Reformed Synod," about 1820 or 1822, became divided into three distinct synods, called "The Associate Reformed Synod of the South," "The Associate Reformed Synod of the West," and "The Associate Reformed Synod of the North." The associate reformed synod censured Messrs. Marshall and Clarkson; a majority of Mr. Marshall's church session opposed him, while a majority of the congregation adhered to him. A contest took place respecting the possession of Marshall's church in Spruce street, and a recourse was had to the legal tribunals, which decided against him and his adherents.

That the associate congregation in Philadelphia was afterwards formed with a view of not being subordinate to any ecclesiastical court whatever—and so that its property should not be affected by any ecclesiastical censure or decision. That its property is held in trust—and the congregation is the only *cestui que trust*, and the only corporate body.

The answer further stated, that the associate synod in Scotland sustained the protest and appeal of Rev. Messrs. Marshall and Clarkson, and recognised them as the associate presbytery of Pennsylvania, and sent ministers to their aid, who, together with said Marshall and Clarkson, having met in presbytery, adopted at Pequa, August 25th, 1784, the "Declaration and Testimony," and declared their adherence to the whole doctrine of the Westminster confession, which was re-adopted by the associate presbytery of Pennsylvania in 1792. That attempts were made about the years 1820 and 1822, unsuccessfully, by some to unite the associate synod of North America with one or more of the associate reformed synods, but such attempts were finally condemned by the former. That in 1788, the general associate synod in Scotland adopted certain articles defining their ecclesiastical relations with the associate presbytery of Pennsylvania, and stating that causes about the profession of the faith should be brought from the latter to the former by reference or appeal. That the associate presbytery of Pennsylvania, in November, 1788, ratified these articles. That the union so defined continues to the present time, being in the nature of the mutual subordination of two equal bodies, in full communion, both being in possession of co-ordinate powers, and members of either having the right of appeal to the other.

That in 1776, the associate presbytery of Pennsylvania was divided into two, that of Pennsylvania, and that of New York; the latter adhered to the associate reformed synod. In 1801, the associate presbytery of Pennsylvania was divided into several separate presbyteries, and constituted a synod, viz. the associate synod of North America; and the associate presbytery of Pennsylvania became the associate presbytery of Philadelphia. That, in 1804, the general associate synod in Scotland enacted a new testimony as a term of communion, whereupon four ministers seceded, and on August 28, 1806, formed "The Con-

stitutional Associate Presbytery," and the general synod excommunicated them. In 1817, the associate synod of North America transmitted to the general associate synod in Scotland, a protest and appeal, by some of their members, against the adoption of the book of discipline, but no action was taken by the Scotch synod thereupon. In 1820 or 1821, the said general associate synod in Scotland formed a union with the burghers or associate synod, and the united body took the title of "The United Secession Church." Against this union there was a protest, and nine of the protesting ministers constituted themselves the "Associate Synod," and referred their case to the associate synod of North America for its approval. In 1826 and 1827 this latter synod recognised the said nine protesters as the associate synod, (in Scotland) as in connexion with, and as constituting one church with them. In 1827, the said Scottish synod united with the before mentioned constitutional associate presbytery, and formed "The Associate Synod of Original Seceders." In 1832, the associate synod of North America recognised the said "Original Seceders" as in full fellowship with them, on the ground of the union as defined in 1788, and in 1835, 1839 and 1840, reaffirmed that decision.

That the associate synod of North America, on various occasions, from 1784 to 1844, testified against the associate reformed synod.

In the latter year, a majority agreed to an alteration of the Westminster confession, in order to effect a union with the associate reformed synods. Against this proceeding, the associate congregation in Philadelphia remonstrated and protested at the annual meeting held January 1, 1845; and the associate presbytery of Philadelphia did also, on April 16, 1845, remonstrate to said synod against its said act. The said synod, notwithstanding these remonstrances, at a meeting at Xenia, Ohio, in 1845, adopted and sent down to the presbyteries and sessions for adop-

tion, a basis of union with the associate reformed synod, which abandoned the doctrine of the Westminster confession, as received at Pequa, in 1784. In May, 1846, it re-affirmed this illegal measure, and in September, 1846, through its delegates in convention, did the same. In October, 1845, the associate presbytery of Philadelphia transmitted this basis of union to the sessions for adoption. The basis came before the session of the associate congregation of Philadelphia on the 3d of November, 1845, when they, with great unanimity, including complainants, formally seceded from, and declined the authority of the said presbytery and synod, and adopted a declaration and testimony against their said illegal acts. Others united with respondents, and on the 11th November, 1845, these constituted themselves "The Associate Presbytery of Philadelphia," and as such now claim and exercise all ecclesiastical jurisdiction over the respondents. The respondents have no other supreme judicatory in this country. The associate synod of original seceders in Scotland, in August, 1845, disapproved of the conduct of the associate synod of North America, and the respondents have referred their case to that synod, agreeably to the articles of 1788. The said associate congregation, at its annual meeting in January, 1846, at which meeting complainants were present, fully approved of the acts of respondents, and they allege that they have a perfect right to select their own pastor.

That there are now three supreme ecclesiastical judicatories in the associate church of North America—two calling themselves the associate synod of North America. One of these being formed out of the so called presbyteries of Vermont, Cambridge, and Albany. That the associate synod of North America, formed in 1801, continued the supreme judicatory no longer than while it adhered to the principles adopted at Pequa, and remained in union with the associate synod in Scotland. But it can never be the

supreme judicatory of any portion of said church which shall have seceded for any actual or supposed defection from the doctrines or standards of the church.

That the term "congregation," as applied to the respondents, means all who worship with them, whether in full communion or not, and by the charter means those paying an annual sum for pew-rent, under certain limitations. The congregation acts through its trustees, the church through its session. The judicatories of the associate church can have no authority over the temporalities of any congregation; and only, in spiritual matters, over those who continue voluntarily to recognise their jurisdiction. The associate synod of North America continued to be the supreme judicatory only till 1841, or, at farthest, till 1844. A sentence of suspension has no effect upon those who secede because of a departure by the majority, in the opinion of the minority, from the doctrine of the church. Such secession is perfectly lawful. The respondents allege that they adhere to the principles of the declaration and testimony adopted at Pequa, in 1784. That the property of the congregation is to be disposed of according to the charter. That a minister under sentence of suspension may, by the principles of the declaration and testimony, lawfully minister in a congregation of the associate church, and can be lawfully called to the office of pastor in any other branch or party of said church, provided he is in good standing and full communion in that branch. That respondent, Webster, is in good standing and full communion with the before mentioned the associate presbytery of Philadelphia, to which the congregation adheres.

The respondents referred to the first two and the fifth of the formula of questions at ordination in support of their views. They alleged that said Webster was the pastor of said congregation, and had never been suspended according to the doctrine and order of the church, as adopted at Pe-

qua. That not the presbytery, but a party, adopted the libel against him at Carlisle, in violation of the discipline of the church. That the proceeding arose out of certain publications which he had made in consequence of the conduct of the synod in 1844. That, however technical the proceedings may have been, they were an abandonment of the principles of the church; being founded upon his writings against the acts of the synod, which asserted opinions in accordance with the former declarations of the presbytery. That in the subsequent declinature and secession, said Webster acted as the organ of the session, and did not himself cause or advise the session room to be closed against the presbytery. That said Webster and M'Naughton did, lawfully and according to the established order of the associate church, on the 11th November, 1845, constitute the associate presbytery of Philadelphia. That no one of the complainants then protested, although R. Skilton, one of them, did attempt to disturb the religious meeting on the evening of that day. That the complainants could not be the congregation aforesaid, whether recognised by the synod or not, as they had either withdrawn from or been suspended from communion in said church, and that there were not among them two ruling elders, which number is always necessary to form a congregation. That by professing to suspend said Webster the opposing party fully confirmed and ratified his secession, and all proceedings against him thereafter were null and void. That the trustees have neither prohibited nor permitted the said Webster to officiate as pastor, having no authority, by the charter, in the matter—their duty being simply to hold and apply the property for the use of such as adhere to the religious principles adopted at Pequa; which principles the respondents hold. That the treasurer, Smith, and secretary, Totten, have charge of the books and papers respecting the temporalities of the congregation, but not of the spiritualities. Said corporation has paid, since

1837, and continues to pay, the salary of the said Webster, as originally stipulated for.

That the trustees would consider it their duty to decline letting any clergyman have the house who is not in communion with the associate presbytery to which said church belongs, such course being in accordance with the wishes of the congregation. They consider that the orderly members of the church have an inalienable right to choose a pastor for themselves. That said Webster is neither a suspended, deposed, nor excommunicated minister.

And, finally, that the whole matter in controversy between what the respondents consider "The Associate Presbytery of Philadelphia," on the one side, and the said associate synod on the other, is still pending before and awaiting the final decision of the associate synod of original seceders in Scotland.

The defendants, O. Skilton and Donnelly, filed a separate and similar answer, with the exception of omitting the averments that the complainants took part and concurred in the annual meeting of January 1, 1846—that said Webster did not cause or advise the session room to be closed against the presbytery—that he exercises the office of pastor to the great satisfaction of the congregation—and excepting also any approving reference to the so called associate synod, organized in 1841—and the assertion that the presbytery to which respondents profess to belong is the supreme judicatory in this country.

The cause was at issue upon the general replication filed by the complainants.

A great mass of parol and documentary evidence was produced on the hearing, the effect of which, so far as is necessary for the proper understanding of the case, will appear in the arguments of counsel and the opinion of the court.

G. M. Wharton and *Meredith*, for complainants:—The

complainants submit that the following facts and averments have been proved. 1. The existence in this country, since 1754, of a denomination of Christians, called the associate church—their division into sessions, presbyteries and a synod—and the respective organization and powers of those bodies, as set forth in the bill. 2. The organization of the associate congregation in Walnut street, Philadelphia, in 1790—its subsequent incorporation in 1802—and its subordination originally to the associate presbytery of Pennsylvania, and subsequently to the associate presbytery of Philadelphia—and the existence of the associate synod of North America as the supreme judicatory of the associate church in this country. 3. The membership and citizenship of the complainants, and their consequent interest in the property of the said congregation, as forming a part of the *cestuis que trust*. 4. The setting forth of the principles of said church in the declaration and testimony, adopted at Pequa, August 25th, 1784, and the character of those principles as stated in the bill. 5. The acquisition, by the said congregation of the real and personal property mentioned in the bill, and its tenure upon the trusts stated therein. 6. The call of respondent, Webster, to the pastorship of said congregation, in 1837, in accordance with the principles of the declaration and testimony—his acceptance of that call, and his subordination, as such pastor, to the presbytery and synod. 7. The charges brought against Webster in 1845, and his orderly trial thereupon before the proper church court—his conviction—and his interlocutory and final suspension—and the character and effect of such suspension as stated in the bill. 8. The disorderly declinature and secession of Webster and his adherents—their attempt to change the presbyterian character of the congregation, and to make it an independent ecclesiastical body—and the protest against such a course on the part of the complainants. 9. The recognition of the complainants as the true body or con-

gregation by the church courts of the associate church, and the condemnation thereby of Webster and his adherents—and the notice to him and to the trustees and elders of the congregation of the proceedings against him, and their result. 10. Webster's continued contumacy—his persistence in the exercise of the office of pastor—and the support and countenance rendered to him therein by the trustees and elders, respondents. 11. The application of the corporate funds of the congregation, by the trustees, to the maintenance of Webster, notwithstanding his suspension, and the use of the property by those who do not adhere to the faith and order of the associate church, as set forth in the declaration and testimony, and the consequent breach of trust on the part of the respondents.

The complainants contend that they are *cestuis que trust* of the property described in the bill—that the defendants are holding and applying the said property to purposes contrary to the trusts thereof—that they ought to be enjoined from so doing, and compelled to carry out the trusts according to the intent of the instruments creating the same. That the property was originally acquired and directed to be held for the use and benefit of a congregation of Christian worshippers in the city of Philadelphia, adhering to the religious principles expressed in the declaration and testimony agreed to at Pequa, by the associate church in Pennsylvania, on the 25th August, 1784, as a prescribed standard of faith and discipline, and for no other use or purpose. That the congregation was, in its formation and organization, a presbyterian one—and the property was acquired and directed to be held for the use and benefit of a congregation adhering to presbyterian principles, and a presbyterial form of church government—and none other.

That the congregation, when formed, and when the property was acquired for its use, was a component and constituent part of the associate presbytery of Pennsylva-

nia, and afterwards became part of the associate presbytery of Philadelphia—and upon presbyterian principles, was subject to the ecclesiastical jurisdiction of said presbytery, according to the order and discipline of the associate church. That in accordance with said principles, the associate synod of North America was formed, and, when formed, became the supreme judicatory of said associate church, of which the said congregation was, and continued to be, a component part. That this relation and subordination was unanimously recognised, admitted, and practically carried out from the formation of the congregation and acquisition of the property, in 1790, until the year 1845—a period of fifty-five years.

That the respondent, Webster, was ordained a minister of the associate church, and installed as pastor of said congregation, according to the form of presbyterian church government, and to the book of discipline of said church, and under and in subordination to the authority of the presbytery and synod aforesaid—and without such ordination, installation, and subordination no public worship could have been rightly had in the church edifice, according to the principles of the declaration and testimony, and the trusts of the property. That the said connexion between the said Webster and the said congregation, on the one part, and the said presbytery and synod on the other, could only be rightly severed on the part of the former by a radical change or actual violation of their religious profession on the side of the latter, and that change or violation persisted in after the use of all possible means by the dissentients to reclaim the offending and erring party. That the act of the courts of the associate church in the conviction and suspension of respondent, Webster, after due trial, is final and conclusive upon the civil tribunals—and that the celebration of public divine worship in the church edifice under his ministry, notwithstanding such suspension, is a violation of the trusts under which the property is held,

inasmuch as said Webster and his adherents (including all the other defendants) have thereby departed from the religious principles of doctrine and order agreed to at Pequa.

That the course of said Webster has arisen entirely from the fact of judicial proceedings having been instituted against him in the courts of the associate church, and from a desire to escape from their necessary consequences. That even if said Webster's course is founded upon a difference between himself and the majority of the synod and presbytery with respect to the true meaning of the standards of the associate church, and the propriety or impropriety of altering the language of the Westminster confession in some particulars, yet that the decision of the majority of the regular tribunals of the associate church upon those points, is final and conclusive upon the ministers and congregations of the same, and will be so considered by the civil tribunals. Both sides claiming to be in the right, the court must either, first, permit the party in possession, however small its numbers, to retain possession without inquiry; a course which might lead to a gross abuse of trust—or, secondly, assume the majority to be in the right, a course consistent with general principles in this country —or, thirdly, enter into an investigation of the merits of the theological dispute.

If the court should decide to investigate the differences alleged by the respondents to have caused their separation from the body with which they admit themselves to have been heretofore connected, and to pronounce upon the propriety of such separation, as tested by the principles of the doctrine and order of the associate church, the complainants contend,—that no act has been done by the associate presbytery of Philadelphia, or the associate synod of North America, amounting to a departure from the religious principles agreed to at Pequa, and that the secession or separation of Webster and his adherents has been contrary to these principles. That the doctrine of the Westminster

confession is not the doctrine of the associate church in North America, except in so far as it accords with the declaration and testimony, the latter being the main subordinate standard of that church. That no act has been done by the presbytery or synod, nor intention expressed to do any act contrary to the principles of the declaration and testimony. That the utmost which has been done by either of those bodies, with respect to the language of the Westminster confession, has been to declare an intention not to object to an alteration therein, in the chapters relating to the powers of the civil magistrate; said declaration of intention having reference to the declaration and testimony as the standard of profession on this point—and the specific alterations subsequently proposed by a committee being in no wise adopted by the presbytery or synod, but merely transmitted by the latter as an overture for the consideration of the inferior church courts.

That the principle of secession, as held by the associate church, does not recognise the right of any number, at their mere will or pleasure, to secede from the majority, and by such act to become, or to continue to be, the true associate church, and to take with them the particular property of which the separating minority may happen, at the time, to have the possession, and to hold it against the will of, and to the exclusion of, the majority. Nothing short of the affirmative of such a proposition will justify the retention of the property in dispute by the respondents.

The following authorities are relied on: *Unangst* v. *Shortz*, 5 Wh. 506, 521; *Com.* v. *Green*, 4 Wh. 531; *Attorney Gen.* v. *Pearson*, 3 Merivale, 400; *Den* v. *Bolton*, 7 Halst. 214; *Means* v. *The Presbyterian Church*, 3 W. & S. 303; *German Reformed Church* v. *Com.* 3 Barr 282; *App* v. *The Lutheran Congregation*, 6 Barr 201; *People* v. *Steele*, 7 Penn. L. J. 324; *Methodist Episcopal Church of Cincinnati* v. *Wood*, 5 Ham. 283; *Baker* v. *Fales*, 16 Mass. 488, &c.; *Stebbins* v. *Jennings*, 10 Pick. 172; *Milligan* v. *Mitchell*, 1 Myl. &

K. 446, S. C. 3 Myl. & Cr. 433; *Attorney Gen.* v. *Pearson*, 7 Simons, 290; *Attorney Gen.* v. *Shore*, 7 Simons, 290, in note; *Trustees* v. *Sturgeon*, 9 Barr 321.

Perkins, for respondents:—The founders of the associate congregation in the city of Philadelphia, retained their temporalities in their own hands, and transmitted them to their congregational successors, to be managed in manner and form as set forth in the deed conveying the property to them, and in their act of incorporation. But they did not subordinate their property to any ecclesiastical court whatever; nor did they leave it subject to the direct or indirect action of any such court. The right of secession is fundamental in every branch of the associate church, whenever any may judge such a step proper or necessary; and all the ecclesiastical censures, which the majority may inflict upon the seceding minority, are held to be absolutely null and void in every particular. Gib's Display, vol. i., pp. 36, 37; Div. Right of Presbytery, 255.

The associate synod of North America, by their vote of 1844, agreeing to alter the Westminster confession of faith, violated the integrity of the church and their covenant obligations to their people. That agreement was not sent down in overture to inferior courts for their judgment, but was an arbitrary act of usurpation, by which said synod changed the constitution of the church, the people willing or not willing. Respondents' cause has been regularly appealed, and is now pending before the only proper and competent tribunal, the united associate synod of original seceders in Scotland, who are the lawful successors of the general associate synod of Scotland, according to the compact of 1788, which has been recognised and acted upon, by both the parties, down to the present time. The associate synod of North America are not the only supreme judicatory of the associate church in this country. There are two others supreme in the same sense that they are,

viz.—the associate synod of North America, re-organized in 1841; and the associate presbytery of Philadelphia, re-organized in 1845. There are also three other ecclesiastical judicatories who have descended from the associate church in this country, who are equally supreme, viz.—the associate reformed synod of the south, the associate reformed synod of the north, and the associate reformed synod of the west. Respondents are in the full possession of all the doctrines, ordinances, government and discipline which have at any time belonged to any branch of the associate church, and have hitherto conducted and are now conducting both their temporal and spiritual affairs according to the true design of their founders. They were the majority of the congregation, as ten to one, when the complainants withdrew from them. They have maintained regular and unbroken succession in their corporate capacity from their founders to the present day, by the regular election of trustees, who have administered their temporal affairs according to the letter of their charter. This is not controverted.

The powers of sessions, presbyteries, and synods are not as set forth in complainants' bill, which omits the fundamental right of secession. The membership of complainants ceased by their own voluntary withdrawal from the church of respondents without opposition, dissent, complaint, protest, or appeal from any act done by respondents. The character of the principles adopted at Pequa, 1784, are not as stated in complainants' bill, but those principles require, in the most unequivocal and explicit manner, the maintenance of the Westminster confession intact, as adopted by the church of Scotland, 1647, and as adopted and explained, not altered, by the associate presbytery of Pennsylvania in 1784. The respondents have neither changed nor attempted to change the presbyterian character of the congregation, but have maintained it, together with the right of secession, which the congregation

always possessed; and respondents are now, as they have always been, in the full enjoyment and free exercise of all presbyterial powers and privileges.

The complainants contend that the decision of a majority of the tribunals of the associate church is final, and will be so considered by the civil tribunals; yet they call upon the latter to say that no act has been done by said ecclesiastical tribunals, "amounting to a departure from the religious principles agreed to at Pequa." Respondents submit that they have proved a wide departure from the principles agreed to at Pequa, both in doctrine and government. To permit the majority to decide upon the right of the minority to secede, would effectually abrogate that right, as the majority in every instance have condemned the seceding minority. The application of the corporate funds by the respondents, is not a breach of trust, but has been, in all respects, according to the design of the original founders, which was to continue the property, together with the income therefrom, in the full possession and enjoyment of their lawful successors for ever, who should continue, not in subordination to the associate presbytery of Pennsylvania, or their ecclesiastical successors, but who should continue to adhere to the religious principles adopted at Pequa in 1784, by the associate presbytery of Pennsylvania. And the reason of all this was, that their act of incorporation might conform to the fundamental right of secession, and that the congregation might exercise that right without any forfeiture or even hazard of their temporalities, and escape the calamity which had befallen Mr. Marshall (their founder) when the secession of 1782 occurred.

Respondents submit that the history of the associate church in Scotland, and those secessions which have taken place, are all-important, as they are fully proved by authentic documents, and by the evidence both of complainants and respondents; and furnish a perfect justification of the course pursued by respondents. It is true, as com-

plainants allege, that "nothing in that history, or in the history of the associate church in this country, affirms the right in the seceding party to carry off the property with them from the majority of the ecclesiastical body with which they were connected; but altogether the contrary." This is the very reason why complainants should not be permitted to carry off with them the property of respondents, who constitute a very large majority of the congregation, as ten to one, from whom they have seceded. This admitted principle of complainants is all that respondents desire; because the associate synod of North America never contributed to the property of respondents, never were *cestuis que trust*, never were incorporated in any manner with the congregation, never had a voice directly or indirectly in the management of its temporal affairs, and are not named as complainants, nor could they be complainants, had they been so named.

The union with the original seceders in Scotland, is not, as alleged by complainants, a union of the supremacy of one synod over another, but a compact of two co-ordinate courts having equal power, with a right of appeal from one court to the other by any of the members of either church on doctrinal questions; such as are now in controversy. This compact was formed in order that their ecclesiastical union might be continued upon a mutual agreement in sentiment, or discontinued when it should be found that this agreement in sentiment ceased to exist; and on this agreement appeals or references have been made by the members of one body to the other since 1788, down to 1846, a period of sixty years. The reference and appeal of respondents to the united associate synod in Scotland, is not inconsistent with any claim of congressional independence set up by respondents. On this point they have asserted, and submit that they have proved a congregational independence in regard to temporalities, while they acknowledge either an ecclesiastical submission to the autho-

rities of the church, or secession, as the only lawful alternative. The question is not, whether the alteration of the Westminster confession, agreed to by the synod in 1844, be repugnant to the declaration and testimony, or not. They agreed to alter, without consulting the church, and without knowing what the alteration should be. They expunged, but filled the chasm with no substitute.

The complainants plead, "that the decision of the majority of the regular tribunals of the church upon these points is final and conclusive upon the ministers and congregations of the same, and will be so considered by the civil tribunals." If complainants mean that the civil tribunals will hold the decisions of church courts as final and conclusive in every thing spiritual, respondents have nothing to object. *But if they mean that the civil tribunals will hold the decisions of church courts final and conclusive in regard to rights of property not their own, respondents must object in the most decided and unequivocal manner. They hope never to witness the day when ecclesiastical courts shall possess jurisdiction over the rights of any species of property except their own.*

The defendants further contend, that the complainants have mistaken their remedy. If they are entitled to the possession of the church and lot, they can have full and complete redress by ejectment, in which the defendants would be entitled to a jury trial. *The Baptist Church in Hartford* v. *Witherill*, 3 Paige Ch. 297; *Lawyer* v. *Cipperly*, 7 Paige Ch. 281. The church and property belong to a congregation adhering to certain principles; and not to one in subordination to, or connexion with any particular ecclesiastical jurisdiction. The circumstances under which this congregation was originally organized, the occasion of forming it, and the men by whom it was done, and who originally composed it, show their object to have been to secure the property for the use of those who held, and who should hold, certain principles,

whether they were or were not in subjection to, or in connexion with any particular ecclesiastical body.

Neither in the deed of trust, nor in the charter subsequently obtained, is subordination to any ecclesiastical court whatever required on the part of the congregation. There is no recognition of, nor allusion to any church, or presbytery, or synod, or other ecclesiastical body to which the congregation must belong, to entitle them to the use of the property. All that is required of them is that they adhere to the religious principles adopted at Pequa in 1784. If they do adhere to these principles, they will keep the property, though every church and ecclesiastical body in the land rejected them for heresy; and should depose the minister and excommunicate the members of the congregation for their adherence. *The Presbyterian Congregation* v. *Johnston*, 1 Watts & Serg. 1; *Duncan* v. *The Ninth Presbyterian Congregation*, 1 W. & S. 37; *Miller* v. *Gable*, 2 Denio, 511.

G. M. Wharton and *Meredith*, in reply:—If the principle of secession is supposed by the respondents to be established by the history of the Scottish church, the complainants submit, that nothing in that history, nor in the history of the associate church in this country, affirms the right in the seceding party to carry off the property with them from the majority of the ecclesiastical body with which they were connected, but altogether the contrary. The evidence shows, that this congregation was formed, and the funds contributed upon the principles of presbyterianism, as set forth at Pequa, in the declaration and testimony —that neither the corporation, nor any existing trustees or elders, nor the congregation for the time being, have any absolute estate in the property, but that the same is held, and should be administered by the existing officers, for the use and benefit of such as adhere to those principles, and for none others.

The qualifications of the Westminster confession were distinctly pointed out in the declaration and testimony, and the marks of difference which were so pointed out by the framers of the latter standard, (including Messrs. Marshall and Clarkson) and were made chief grounds of their testimony, viz. the powers of the civil magistrate *circum sacra*, or about religious matters, have been attempted to be removed by the respondent, Webster, and for these deviations of his from the doctrine of the declaration and testimony has he, among other things, been condemned by the presbytery and synod. Any subordination of the associate church in this country to the Scottish church was long ago abolished, and the associate synod of North America has been, for many years, the supreme judicatory of the associate church here. The associate synod of North America has never altered the Westminster confession, nor even agreed to any alteration repugnant to the declaration and testimony.

The complainants, in conclusion, contend, that the evidence establishes no such distracting and destructive principle, as a tenet of the associate church, as was argued for the respondents, viz., "that the associate synod of North America was not the supreme judicatory over any persons who may have seceded on account of any supposed defection from the standards, nor have church sentences any effect in such cases; the church judicatory having only authority over those who voluntarily recognise their jurisdiction:"—on the contrary, the principles of that church recognise the act of the majority as necessarily of authority in ecclesiastical matters.

Rogers, J.—This is a bill in equity filed by the complainants as members of a church incorporated by the commonwealth of Pennsylvania, by the name of "The Associate Congregation in the City of Philadelphia." The complainants are members of the church, and the defend-

ants are the trustees of the corporation, certain ruling elders of the congregation, the Rev. C. Webster, claiming to be the pastor thereof, and the corporation itself. The object of the bill is, to compel the defendants, (who, it is alleged, have refused, and still refuse to do so, contrary to their duty, and the principles, rules and order of the church) to permit clergymen, in full communion with the presbytery and synod, and who adhere to the principles and practice of the associate church, with which they are in connexion, to minister to the congregation in the church edifice, and that the trustees may be compelled to appropriate the profits to the support of such ministry, and none other; that the trustees and C. Webster, who with the assent of the trustees, has officiated in the church, not being a qualified minister in full communion with the said presbytery and synod, and who does not adhere to the principles and practice of the associate church, having been suspended from his office, may be compelled to account for the property since the time of his suspension; that the trustees may be removed from office for their breach of trust, and others appointed in their stead, and that the books, papers, records and property of the said congregation, be delivered to such new trustees; that the said Webster may be restrained and enjoined from officiating in any way as minister in such corporation, or from intermeddling with the spiritualities or temporalities thereof, and that the trustees and ruling elders be also restrained and enjoined from permitting the said Webster so to do, and from appropriating said property in any other way than for the support of a minister in regular standing and full communion as aforesaid, and settled according to the principles and practice of the associate church; and, finally, from interfering with the occupation of the said church edifice by the complainants and other members of the congregation who adhere to the said presbytery and synod, in order to the administration of divine ordinances according to the faith and discipline of the associate church.

[Skilton v. Webster.]

The complainants, being proved to be citizens of the commonwealth, and members of the corporation and the church, have the undoubted right to file a bill, alleging the grievances of which they complain, and requesting relief, such as contained in the prayer of their bill. If the allegation stated be true, and there be nothing to make this an exception to the general rule, it is the duty of the court to grant relief, without any regard to the comparative numbers of the respective parties in the congregation. Such considerations cannot enter into the merits of the case. The cause must be ruled on adjudged cases, which are uniform, so far as this question is concerned.

The statement in the prayer of the bill, which shows the objects sought to be attained by the bill, also shows that there is nothing in the first point of the defendants, viz., that the complainants have mistaken their remedy. If they are, (say they) entitled to the possession of the church and lot, they can have full and complete redress by ejectment, in which the defendants would be entitled to a jury trial. That if the complainants are the persons entitled to the possession of the lot and buildings, they can recover, in ejectment, not only the possession, but the mesne profits. I agree, that if the complainants can, (as is alleged) have full and complete redress by ejectment, a court of equity has no jurisdiction, and it would be our duty to refer it to the appropriate tribunal; as it is a rule in equity, well settled, that when a person has adequate relief at law, chancery will not entertain jurisdiction. But cases where chancery has refused to interfere are where the remedy was full, complete and adequate. It is true, in an ejectment, the complainants, if they have title, may recover the possession of the premises and mesne profits; but that is the extent of the redress to which they would be entitled. A very general ground is asserted for the jurisdiction of a court of equity, and that is, not that there is not a remedy at law, but that the remedy is more complete and adequate

in equity, and besides it prevents a multiplicity of suits. 1 *Story's Eq.* § 437. But ejectment would not be a complete remedy, as is obvious from the prayer of the bill. The redress would be inadequate to the occasion; and, as the remedy is more complete and adequate in equity, and has the further recommendation that it prevents a multiplicity of suits, we dismiss this part of the respondents' defence.

The exceptions already noticed are formal, rather than striking at the substance and real merits of the question, and perhaps the objection which I am now about to examine comes within the same category, being in the nature of a dilatory plea, leaving the principal points in the case entirely untouched. I allude to the allegation, that the respondents' cause has been regularly appealed, and is now pending before the only proper and competent tribunal, the united associate synod of original seceders in Scotland, who are the lawful successors of the general associate synod of Scotland, according to the compact of 1788, which has been recognised, as is alleged, and acted upon by both parties, down to the present time. If, on investigation, it should be as stated, I should think it my duty to dismiss the bill, or, at any rate, delay proceeding in this case, until the question there pending should be decided by the only competent tribunal. For the decisions of ecclesiastical tribunals, in all cases on doctrine, order, and discipline, are conclusive in the common law courts. Indeed, we are not competent to judge of nice questions of theology, arising out of their respective discipline or doctrine. We leave it to those who make it the business of their lives to master the intricate and perplexing questions which often arise in the various protestant churches, and sometimes even in the infallible church itself.

That there was a reciprocal right of appeal existing between the associate presbytery of Pennsylvania, and the associate synod of Scotland, from at least the year 1788, and continued for a considerable length of time, appears to

be placed by the evidence beyond all doubt. It, however, is not so clear, that this right of appeal has been recognised by the respective churches, since the establishment of a synod by the associate church in this country. But, be this as it may, before we can agree to suspend the action of the court, we must be satisfied that an appeal has been taken, and the grounds of the appeal. When the question was asked,—from what the defendants had appealed, when, and by whom the appeal was taken,—no satisfactory answer was given. It must be remarked, the right of appeal is limited, and only lies in the case of any difference which may arise in the presbytery of Pennsylvania, about the profession of the faith, or any truth or duty affecting their connexion with the associate synod of Scotland. As to what relates to scandals, or causes of a personal or private nature, the associate synod of Scotland do not undertake to assume jurisdiction. They wisely judge the prosecution of such appeals would be inexpedient and improper, at such a distance. Appeals of that kind, as they say, they have, from their intercourse with the presbytery for thirty-five years, no reason to expect. (Exhibit B, page 46, defendants' testimony.) The appeal then being restricted within narrow limits, it is not unreasonable we should be desirous of knowing the reasons of it, the persons who made it, when it was taken, and of what errors or grievances they complain. It is more particularly necessary in this case, as we cannot tell whether the appeal was taken from the sentence of the ecclesiastical court, suspending the pastor of the church, or from errors about the profession of the faith, or any truth or duty affecting their connexion with the associate synod of Scotland. All the evidence we have of the appeal, is contained in the minutes of the presbytery formed by Messrs. M'Naughton and Webster, the testimony of M'Naughton, and a letter signed by a certain Thomas M'Crie, directed, as I suppose, to M'Naughton. In the proceedings of the presbytery, of

the 11th Nov., 1845, there is this minute: "N. B. The presbytery will present all their proceedings to the first meeting of the constitutional synod for review, and will abide by their decision." Mr. M'Naughton says, the presbytery did present their proceedings in writing to the constitutional synod, but when, he has not informed us, nor has he annexed a copy of his communication. He says, he has an answer from the synod; and in proof of it, produces the letter already referred to, signed by Thomas M'Crie, an individual of whom we know nothing, except what is derived from his own letter. If the defendants had produced a certificated extract from the minutes of the constitutional synod, verified by oath, containing a certificate that an appeal had been filed, accompanied with a copy of the communication from the presbytery, there would be some evidence of the fact. But all we have to rely on is proof that a written communication was made, which is not produced, and the letter of Thomas M'Crie, of whom we know nothing, not under oath, stating that it had been received and read, at a *pro re nata* meeting, called in June, 1847. At that meeting, the synod came to a resolution somewhat, as the writer states, in the following terms. That in the absence of all representation from the other party in this case, and at such a distance from the scene of action, necessarily prevented from gaining a full and accurate knowledge of the facts, the synod found itself unable to pronounce any opinion on the question, and remits it for further consideration, till next ordinary meeting. It appears that no representation or statement was made by the synod of the associate church on this side of the Atlantic. Why this was—from what cause this omission arose, we know not. Whether it proceeded from want of notice of the pretended appeal, or other cause, it would be useless to conjecture. The letter is dated the 7th Sept., 1847; of course, the next ordinary meeting would be some time in the following year. Since then, we have no farther

information as to the action of that body, and perhaps it is not an unreasonable presumption that none is intended, as the proposition or overture of synod, to which such objection is made, being rejected by the presbyteries, further proceedings have not been had in favour of the union of the associate and associate reformed churches. It must also be remarked, that no proof has been given of notice of the appeal to the synod, and the presumption is, that none was given. Taking all the circumstances into consideration, I have come to the conclusion, it would be unjust to the complainants to dismiss their bill, or to delay proceedings on that account.

And this brings me to the consideration of the remaining point, on which the rights of the parties must ultimately depend. The defendants insist, that the founders of the associate congregation in this city retained their temporalities in their own hands, and transmitted them to their congregational successors, to be managed in manner and form as set forth in the deed conveying the property to them, and in their act of incorporation. That they did not subordinate their property to any ecclesiastical court whatever, nor did they leave it subject to the direct or indirect action of any such court. And, further, that the right of secession is fundamental in every branch of the associate church, whenever any may judge such a step proper or necessary: and all the ecclesiastical censures which the majority may inflict upon the seceding minority are held to be absolutely null and void, in every particular.

In support of the first proposition, the defendants rely on the following clause of the deed for the property in controversy. Now, "be it known, that the said trustees, and their successors in office, do hold the said church and lot of ground in trust for the associate congregation in the city of Philadelphia, who adhere to the religious principles expressed in a declaration and testimony for the doctrine and order of the church of Christ, agreed to at Pequa, the 25th

day of August, one thousand seven hundred and eighty-four, by the associate presbytery of Pennsylvania." And also on the charter, which is to the same purport. The defendants contend, that the founders did not intend to subject their property to any ecclesiastical court, nor did they leave the congregation subject to the direct or indirect action of any such court. That all that is required is, that the *cestuis que trust* should adhere to the religious principles expressed at Pequa, in 1784. That there is no allegation, much less any proof, that the defendants, or those whom they represent, have in any particular departed from those principles. On the contrary, it is their strict adherence to those principles, and their refusal to depart from them in any, the slightest particular, that has brought upon them this suit. If this be true, then I agree the cause is with the defendants. Thus, in *The Presbyterian Church* v. *Johnston*, 1 W. & S. 1, which was the case of a presbyterian church refusing to acknowledge either the old or new school general assembly, the chief justice, on page 40, puts the decision in the case on the fact, that no particular presbyterian connexion was prescribed by the founders, or established by the charter. So, in *Miller* v. *Gable*, 2 Denio 511, the vice-chancellor says, "I think there is a plain distinction, in sound reasoning, and supported by authority, between the dedication of property to support peculiar tenets, and its dedication to support such tenets in connexion with, and in subjection to, a particular church government." And again, he says, "Property may be given to the support of tenets, without subjection to any ecclesiastical power which upholds those tenets." The chancellor relies on the case of *Den* v. *Bolton*, 7 Halst. 206, as illustrating and supporting the above principle. The result of the cases I take to be this, that when it appears that it is not dedicated to support tenets in connexion with a particular church government, then it is not subject to any ecclesiastical power which upholds those tenets. If,

then, it appears that the deed of the property, the declaration of trust, and the charter, are to be so construed, I agree there is an end of the complainants' bill, which must be dismissed.

These principles being conceded, let us examine the first point in connexion with these tests. The proposition is, that the church and property belong to a corporation adhering to certain principles, and not to one in subordination to, or connexion with, any particular ecclesiastical jurisdiction.

The defendants seem to consider, that inasmuch as there is nothing in the deed of trust, or charter, which expressly, or by necessary implication, makes it in subordination to any ecclesiastical court, no allusion to any church, or presbytery, or synod, or other ecclesiastical body, to which the congregation must belong, the result is, that this congregation or corporation must be taken, not in subordination to, or connexion with, any particular ecclesiastical connexion. But I cannot agree to this view of the principle; for the very reverse of it is the true rule; particularly as applied to a presbyterian church: *primâ facie*, they are subject to the jurisdiction of the ecclesiastical courts, and if they wish exemption from their jurisdiction, it is necessary for them to show most clearly that such was the intention of the founders of the church. It may, in truth, be matter of much doubt, whether the presbyterian church would admit into their connexion any congregation, which would in their charter, or otherwise, claim an exemption or independence of the ecclesiastical courts of the church. They could not, I think, agree to do so, consistently with their belief, that the ecclesiastical courts are a divine institution, and that due obedience and subordination are due to their decisions. It would, in fact, be admitting to their communion a connexion not presbyterian, but a *quasi* congregational or independent church. But, be this as it may, let us examine the case on the grounds the defendants have chosen to place it.

The circumstances, say the defendants, under which the congregation was originally organized, the occasion of forming it, and the men by whom it was done, and who originally composed it, show their object to have been, to secure their property for the use of those who held and should adhere to certain principles, whether they were, or were not, in subjection to, or in connexion with, any particular ecclesiastical body. In support of these views, the defendants gave a history of the causes which led to the formation of the congregation, which it would swell this opinion to an unreasonable extent to incorporate; it having resulted, as they say, in the loss of their property in Spruce street, by its being in trust, not only for those who held certain principles, but by their being required to be in connexion with a particular ecclesiastical body: accordingly, the Rev. William Marshall, and those who had been turned out with him, determined to protect any property they might thereafter acquire from being affected by any ecclesiastical body, or the censures of any such body. The founders were anxious to secure adherence to principles, not to ecclesiastical bodies.

Now, giving this view of the case all the weight to which it may be justly entitled, and granting that the Rev. Mr. Marshall, and those who acted with him, endeavoured to prevent this, and all other acquired property from being interfered with and affected by ecclesiastical censure, decision or sentence, the question recurs,—what is the proper construction of the words used in the instrument by which they have declared the uses, intents, and purposes for which the property should be holden? The language employed is the best exponent of the intention of the parties to a contract or declaration of trust. Extraneous evidence and circumstances may be resorted to, in aid of a doubtful construction, although it cannot be legitimately used to control the obvious meaning of the language which parties have chosen to employ. The first remark which I

feel myself bound to make is, if the intention of Mr. Marshall, and those who acted with him was as the defendants contend, they have been very unfortunate in the language they have used to express their meaning. And this is the more remarkable, because all difficulty on this head could have been so easily obviated by the addition of negative terms, namely,—but not in subordination to, or connexion with, any particular ecclesiastical jurisdiction. This was so obvious, that I cannot help believing this course would have been adopted by such a sagacious man as Mr. Marshall, if he and those who acted with him, were as desirous as represented to protect their property from being interfered with, or in any manner affected, by ecclesiastical censure, decision or sentence. But the truth of the matter, I presume is, that although Mr. Marshall, when smarting under his supposed wrongs, may have entertained such views, yet, when he had time to reflect, he recollected he was a presbyterian, and not a congregationalist; and hence, he omitted from the declaration, and the charter, all negative words of the description above suggested, and all words calculated to convey that idea. Hence, whatever may have been their intention originally, we are not without reasons for believing, that intention may have been modified or changed. Such an inference is by no means improbable, when we advert to the declaration of trust, and the charter. The words of the declaration of trust and charter, as above stated, are, that the church and lot of ground are to be held in trust for the associate congregation, who adhere to the religious principles expressed in a declaration and testimony for the doctrine and order of the church of Christ, agreed to at Pequa, &c. In order to understand the meaning of the parties, we must resort to the declaration itself, and inquire, what is meant by religious principles, as expressed at Pequa? What is to be understood as the doctrine and order of the church of Christ, as then agreed to? The declaration at Pequa, be it observed,

expressly recognises the Westminster confession of faith, as they are received in the declaration and testimony. "It belongeth to synods and councils (*vide* 31st chapter, § 3, confession of faith) ministerially to determine controversies of faith, and cases of conscience; to set down rules and directions for the better ordering of the public worship of God, and government of his church; to receive complaints in cases of mal-administration, and authoritatively to determine the same, which decrees and determinations, if consonant to the word of God, are to be received with reverence and submission, not only for their agreement with the word, but also for the power whereby they are made, as being an ordinance of God, appointed thereunto, in his word." And in accordance with this, are the ordination vows of ministers in the church; vows, be it remarked, which the Rev. Messrs. Webster and M'Naughton must have taken at their ordination. They acknowledge their belief in the whole doctrine of the confession of faith and catechisms, larger and shorter, agreed upon by the assembly of divines at Westminster, as received in the declaration and testimony. And they expressly acknowledge presbyterial church government to be a divine institution, and appointed by Jesus Christ, the only king, head and lawgiver of the church; to continue in it to the end of time. If there be any thing clear, it is, that it is the belief of all who adhere to that denomination of Christians, that presbyterial church government is a divine institution; that this is one of the fundamental principles of all presbyterian churches, including the associate church, and all those who adhere to the principles agreed to at Pequa. Indeed, the wonder is, that this should be doubted by any person, particularly by Messrs. M'Naughton and Webster, ordained ministers of that church.

We come now to the consideration of the next, and only remaining point of the defendants' case, namely,—that the right of secession is fundamental in every branch of the

associate church, whenever any may judge such a step proper or necessary; and all the ecclesiastical censures which the majority may inflict on the seceding minority are held to be absolutely null and void, in every particular.

That the right of secession is an inherent and distinctive principle of the associate church, is fully established by the testimony of Drs. Stark, Bullions, M'Naughton, and Beveridge, as also by the standards of the church. Thus in *Gib's Display*, p. 36, 37, in note, the following language is held: "We are indeed bound at our ordination to subject ourselves under the judicatories of the church, but it is not an absolute subjection that we engage unto. It is not a blind and implicit obedience, that we bind ourselves unto, but a subjection in the Lord; a subjection qualified and limited by the word of God, and the received and known principles of the church." The declaration and testimony adopted at Pequa is equally clear and distinct. "We testify against those who teach that we ought not to separate from any church, because of its corruptions, and its obstinacy in them, while we have just cause to believe that the ordinances of grace dispensed are blessed of God, as a means of saving sinners, and edifying saints. This is as much as to say, that we ought not to separate from a corrupt church, as long as we are assured that we leave no righteous person behind us in it, that we must continue in it, till we are assured it becomes wholly a synagogue of Satan; and that we must let a church and state utterly perish, before we take any effectual means of restoring it. We testify also, against all those who, hearkening to such teachers, continue in communion with a church in which the truth is denied, its enemies not censured, and the testimony of such as adhere to it suppressed or despised; especially against those who, after a door is opened, and a call given them, yet refuse to come out from such corrupt societies." The standards of the church teach, that this right of secession is fundamental in every branch of the

associate church, when any may judge such a step proper or necessary. Nay, not only that it is a right, but that it is a duty, to separate from a church corrupt in principle, or practice, and fallen into gross error and doctrine. They are commanded to withdraw from every brother that walketh disorderly. *Gib's Display*, p. 36, 37; *Alexander and Rufus*, p. 209, 210; *Div. Right of Presbytery*, p. 255.

The history of this church, which was founded in secession, shows that this right has been perhaps too often exercised. Nor do I understand the right of secession to be denied, except so far as that the complainants contend it was improperly exercised, in this case, because the connexion between Webster and the congregation, on the one part, and the presbytery and synod on the other, could only be rightly severed, on the part of the former, by a radical change or flagrant violation of their religious profession on the side of the latter, and that change and violation persisted in after the use of all possible means by the dissentients to reclaim the offending and erring party. Whether the secession of the congregation and pastor was right or wrong, it is not my purpose to inquire, as it cannot affect the result of the case in any way. That it was precipitate, and, with deference be it spoken, unwise, all must agree. It certainly has the appearance of a step taken to avoid a trial of charges preferred against the pastor of the church.

Leaving this part of the case, let us direct our attention to a much more pertinent and important question, namely, admitting the secession of the congregation and pastor to be correct, what are the consequences of the separation? Have they the right to retain the property, or is it vested in such members as adhere to the great body of the associate church? And this will depend on the solution of another question, namely, whether the secession, in this instance, is to be viewed as the secession of the majority, or the secession of a minority; in other words, does the

majority of the congregation, which the defendants undoubtedly are, or the majority of the associate church, in whose right the complainants claim, determine the right of property? The title to the estate is the real question, as is the case in all ecclesiastical disputes, professions to the contrary notwithstanding. On this point, after serious reflection, I see no difficulty. The associate church, represented by the synod, who are the real parties, are the majority; the congregation are the minority. It therefore presents the simple case of a minority, with or without cause, seceding from the majority of the church. And here let me observe, that the decisions of ecclesiastical courts, like those of every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God, and the discipline of the church. A party thinking himself aggrieved by the decision of a lower church tribunal, should appeal to a higher. *German Reformed Church* v. *Com.* 3 Barr 282. That the majority retain the right, and the seceding party relinquish it, is shown by the following authorities:—*Unangst* v. *Shortz*, 5 Whart. 521; *Means* v. *The Presbyterian Church*, 3 W. & S. 303; *German Reformed Church* v. *The Commonwealth*, 3 Barr 282; *App* v. *The Lutheran Congregation*, 6 Barr 201; *People* v. *Steele*, 7 Penn. L. J. 324; *The Methodist Episcopal Church of Cincinnati* v. *Wood*, 5 Hamm. 283; *Baker* v. *Fales*, 16 Mass. 488. In the *Commonwealth* v. *Green*, it is ruled, that a popular body is known only by its government or head. In case of division, the party having the numerical superiority is entitled to represent and perform the functions of the original body.

In *Den* v. *Bolton*, EWING, C. J., says that to constitute a member of any church, two points at least are essential; a profession of faith, and a submission to its government. It was held, that a part of a congregation, separating from, and renouncing the jurisdiction of a classis, (or presbytery) although declaring that they retained the faith and doctrines

of the reformed Dutch church, and uniting with another classis, lost their right to the corporate property. That case is very similar to the present. The principle is the same, the only difference being, that they united themselves with another presbytery, whereas here they formed a presbytery for themselves, claiming that they are the true and legitimate associate church.

In *App* v. *The Lutheran Congregation*, a devise to the Lutheran congregation in Selin's Grove, was held to designate that portion of the old congregation which continued to worship in the old church and adhered to the government, form of worship, and doctrines in practice when the bequest was made.

In the case of the *People* v. *Steele*, S. C. New York, 7 Penn. Law Journ. 324, it is held, the great and paramount duty of trustees of religious corporations is to see that the temporalities committed to their charge are fairly and fully devoted to the purposes of their founders; and consequently, when the intention of the donors was the establishment of a methodist episcopal church, in connexion with the general church of that denomination, the act of the trustees in refusing to receive a preacher appointed by the bishop, is an act of insubordination. The intention of the donors can be inferred from the terms of the grant, and the cotemporaneous acts of parties. The trustees cannot be excused in their insubordination, because they are sustained by a majority of those to whom they owe their appointment. That authority applies to the present case, for here the trustees have been guilty of an act of insubordination, in withdrawing themselves from the jurisdiction of the associate synod, and it is no excuse for them, that the majority of the congregation, with their pastor at their head, have been guilty of the same offence.

So also seceders from the methodist episcopal church, who organize a separate conference, and reject the office of bishop, are not entitled to any part of the property of the society from which they secede.

The authorities cited conclusively prove, that the defendants, who are a minority of the whole church, are not entitled to any part of the property of the church from which they thought proper to separate. In that respect, they place themselves in the same category with an individual who leaves a congregation or church of which he was a member, who, it will not be pretended, would be entitled to take with him any part of the property which belongs to the corporation or church to which he belonged at the time of his separation.

It is nothing to the purpose, that the defendants are, numerically, the majority of the corporation, nor that they remain in possession. Having separated themselves from the ecclesiastical body of the church, formed a new presbytery for themselves, the complainants, who are adhering members, by operation of law, become the corporators, and as such are entitled to the possession. Nor is this view of the case in opposition to any principle of secession, as held by the associate church. The associate church does not recognise so absurd a principle, as that any members at their mere will and pleasure have the right to secede from the majority, and, by such act, to become, or to continue to be, the true associate church, and to take with them the particular property of which the separating minority may happen at that time to have the possession, and to hold it against the will of, and to the exclusion of, the majority. In that respect, at least, they are in union with every Christian church, and it may be doubted whether any church could exist which should incorporate into their system any such destructive principle. A case cannot be found, because none such exists, either in Scotland or in this country, where any such doctrine has been advocated, much less made a rule of action. Strip this case of the drapery with which it has been surrounded by the ingenuity of counsel, and what is its aspect? The associate synod, at least a large party of them, being desirous of a union

with the associate reformed synod, sent down an overture to the various presbyteries in that connexion, for that purpose, according to the constitution and order of the church. The plan of the union was rejected by the presbyteries, and among others by the presbytery of which the Rev. Mr. Webster, one of the defendants, and the pastor of this church, was a member. This proposition of the synod, for it is nothing more, met in its progress with a most violent and determined opposition, and particularly from Mr. Webster, who published a book on the subject, entitled Divine and Human Rights, which contained, as the presbytery of the church, sitting at Carlisle, supposed, divers defamations and slanders of church courts, and character and motives of individuals, especially ministers of the gospel; that he had pursued divisive courses, deserving of censure, according to the word of God, and the subordinate standards of the church; that he showed contempt of the synod's authority, coupled with injurious misrepresentations of their special acts, and slanderous impeachments of their motives, and lastly, that he had been guilty of such falsehood as deserved censure, according to the word of God, and the subordinate standards of the church. These serious charges, affecting his character as a man, and his standing as a Christian minister, were put into proper form; the libel adopted, and ordered to be put into the hands of Mr. Webster. The presbytery was appointed to meet Nov. 12th, 1845, at the session room of the first associate congregation of Philadelphia; but finding the appointed place of meeting shut against the presbytery, they finally agreed to proceed to the meeting-house of the second associate congregation, and hold their meetings there. When the presbytery met, they found that Webster, instead of meeting and refuting the charge, together with F. W. M'Naughton, another member of the presbytery, had separated themselves from the presbytery the evening before, calling themselves the associate presbytery of Philadelphia,

and that they had publicly declared their determination to renounce the authority of the synod, and of the presbytery appointed to try him. In consideration of these circumstances, the presbytery resolved, and they could do no less in the face of such an act of contumacy and insubordination, that these offending brethren should be suspended from the exercise of the gospel ministry and the communion of the church, until they gave satisfactory evidence of repentance.

In my judgment, Mr. Webster greatly erred. A proper respect for his own character, as a Christian minister of the gospel, ought to have induced him to meet and refute the charges alleged against him; but instead of pursuing this obvious and respectful course, which was due to himself and the church of which he was a member, the evening before the meeting appointed for his trial, he secedes from the church, and now, instead of submitting to the sentence of the court, and attempting to give satisfactory evidence of repentance, he denies that he is subject to ecclesiastical censure, and boldly insists that he and those who act with him, are the true representatives of the church organized by the secession of Marshall and Clarkson; that the defendants are in the full possession of all the doctrines, ordinances, government and discipline, which have at any time belonged to any branch of the associate church, and have hitherto conducted, and are now conducting, both their temporal and spiritual affairs, according to the true design of their founders. They further contend, they have made no secession from the associate church; they own her doctrines contained in her profession of faith, they observe the received and approved uniformity of worship, they adhere unto her presbyterian government and discipline, according unto the word of God, and their solemn covenant engagements, and they have not been convicted of any thing in doctrine or practice to the contrary; that they strictly adhere to the religious principles expressed

in the declaration and testimony for the doctrine and order of the church of Christ agreed to at Pequa. The defendants more than insinuate, that, instead of their seceding from the majority, the majority have seceded from them, an act of folly, (there being no necessity for it,) which majorities seldom, if ever, commit. What may be the effect of the decision of the presbytery on the standing of the Rev. Mr. Webster, as a Christian minister, it is not my province to determine. These questions are best understood by the ecclesiastical bodies themselves, and there it is my purpose to leave them. But so far as it regards the temporalities of the church, it comes within the jurisdiction of the civil tribunals of the country. In the judgment of this court, the defendants have seceded from the associate church, and have brought upon themselves all the consequences of such secession, namely, forfeiture of all the interests which they have heretofore had in the temporalities of the church. I cannot agree that they have adhered to the religious principles agreed to at Pequa, because one of the fundamental principles of the declaration and testimony is, that presbyterial government, consisting of sessions, presbyteries and synods, is of divine institution, and as such entitled to obedience, reverence and respect; and the defendants have repudiated, trampled on, and despised the jurisdiction and sentence of their court appointed to try, and who did try, and convict one of the defendants of divers grave and serious charges, alleged and proved against him.

On the whole case, the court are of opinion, and do decree, that the defendants do and shall permit clergymen in good standing, and full communion with the associate presbytery of Philadelphia, and the associate synod of North America, and who adhere to the principles of faith, discipline, and government of said associate church, to preach, teach, and administer divine ordinances, according to the established and received doctrines of said church, to the first associate congregation of Philadelphia, in the

church edifice in Walnut street, between Fourth and Fifth streets, in the city of Philadelphia; and that the trustees, defendants, viz., said M'Gonegal, Skilton, Donnelly, Auld, Totten, and Smith, do and shall appropriate the funds, property, and effects of said congregation, and said corporation, defendant, to the support and maintenance of such preaching, teaching, and ministration, and none other; and that the said trustees and the said Webster do account for the said property, funds and effects, and the proceeds and income thereof, since the twelfth day of November, 1845. And it is ordered that it be referred to a master to take an account, &c. And for the better taking of the said account, and discovery of the matters aforesaid, the parties are to produce before the said master upon oath, all deeds, books, and writings in their possession or power relating thereto, and are to be examined upon interrogatories as the said master shall direct, who in taking said account is to make unto the parties all just allowances. That the said M'Gonegal, Skilton, Donnelly, Auld, Totten, and Smith be removed from the office of trustees of said congregation, and that they, and each of them, deliver to the trustees to be elected in their place by the said congregation, in pursuance of the charter of said church, all and singular, the books, property, and effects of said associate congregation. That the said Webster be, and he hereby is enjoined and restrained from preaching, teaching, or in any manner officiating as pastor or minister in said church edifice of said first associate congregation of Philadelphia, and from intermeddling in any manner with the spiritualities and temporalities of the same,—and that the said trustees, M'Gonegal, Skilton, Donnelly, Auld, Totten, and Smith, and the said James Auld, Samuel Fulton, John M'Elwee, Robert Lamberton, Samuel Wilson, John Wright and Thomas Sharkey, ruling elders, be and they are hereby restrained and enjoined from permitting said Webster to preach, teach, or in any manner to administer divine ordinances in said

church edifice, and from appropriating or in any manner disposing of the funds, property or effects of said congregation and corporation, for any other purpose or object than that of the support and maintenance of a pastor or minister in regular standing, and in full communion with said associate presbytery of Philadelphia, and said associate synod of North America, duly called, settled and inducted as pastor of said congregation, according to the rules and principles of faith and practice, discipline and government, of said associate church. And further, that said defendants be restrained and enjoined from preventing or in any manner interfering with the occupation of said church edifice, by the complainants or other members of said congregation, adhering to the said associate presbytery and synod, for the purpose of having divine ordinances administered therein, according to the principles of faith and practice, discipline and government, of said associate church. And that the said defendants pay the costs of this suit, to be taxed by the clerk.*

* In the methodist episcopal church, the election and ordination of the priesthood by the general or annual conference, the ordination of them by laying on of hands by a bishop and elders, and the fixing of their appointments by the bishop, are cardinal points—the last a distinctive one—it is the rock on which the church is founded: *hence*, where a charter was granted to a congregation represented by trustees, recognising their connexion with that church; an amendment to the charter whose object was obscure, was construed not to give to the trustees of the congregation the right of electing the elder in charge, the effect of which would have been to violate the fundamental articles of the discipline of the church to which the congregation professed to adhere, especially as there had been a usage of thirty years in accordance with the discipline. *Com.* v. *Cornish*, 1 Harris 288.

Towar *v.* Barrington et al.

[March 15, 1851.]

To avoid a deed, as fraudulent, under the statute of 13 Eliz. ch. 5, it must be shown that both parties to it intended the forbidden fraud.

An assignment for the benefit of creditors is not fraudulent in consequence of the assignors having previously confessed a judgment in trust for all their creditors except the complainant, upon which an execution had been issued and levied before the making of the assignment.

A chancellor will not exercise his discretion in giving effect to executory agreements, in detriment of the rights of innocent third persons, without notice.

Therefore, an agreement with a creditor not to assign, encumber or dispose of the debtor's personal property in any manner, to the prejudice of the creditor, and that every such assignment shall be void as to him, will not be enforced in equity, when the rights of other creditors without notice have intervened.

The levying of an execution operates to vest an interest in the sheriff, sufficient to enable him to pursue the goods levied in the hands of a trespasser; but, until sold, the property of the judgment debtor is not wholly divested; it remains in him, subject to the levy, and is at his disposal, burdened with the encumbrance.

A judgment confessed by a firm to secure sundry partnership creditors, is not fraudulent, because among the debts secured, are sums owing by the firm to the individual partners as executors or administrators.

Neither the common law nor the statute of 13 Eliz. prohibit an insolvent from preferring one creditor before another by a confession of judgment.

But since the passage of the act of 16th April, 1849, such preference, by a confession of judgment, is fraudulent and void, as against a subsequent assignee for the benefit of creditors; and a court of equity, in such case, being in possession of the whole subject, by the filing of a creditor's bill, will compel all the creditors to come in under the assignment.

In Equity. Motion for special injunction. This was a bill in equity filed by Alexander Towar against Edmond Barrington, George D. Haswell, Mary Ann Haswell and Thomas Bell, setting forth that the complainant, being a bookseller and stationer, in Philadelphia and New Orleans, on or about the 26th May, 1838, sold out his stock in

Philadelphia, to the firm of Haswell, Barrington & Haswell, (then consisting of John J. Haswell, since deceased, and the said E. Barrington and G. D. Haswell) and took from them a bond and warrant of attorney in the penal sum of $25,000, which, in an agreement between the parties, of the same date, was declared to be given to secure the payment of the said purchase, and of certain notes advanced for their accommodation, &c. The agreement also provided, that *the said obligors should not assign, or in any way dispose of their stock or effects to any person or creditor in prejudice of said Towar, and that every such assignment or transfer should be void as to him.* That, afterwards, about the 13th August, 1839, he sold his New Orleans stock to the same firm, who also assumed the payment of all the debts due by the complainant, arising out of the New Orleans business, and executed to him two bonds and warrants of attorney, one in $20,000, conditioned for the payment of $10,000, the amount of the purchase money; and another in $34,000, conditioned for the payment of $17,000, to secure performance of the covenant by the obligors, to pay the debts and liabilities of the complainant. Simultaneously with these last bonds and warrants, an agreement was executed, declaring the purpose for which they were given, and containing provisions similar to those in the agreement of 26th May, 1838; with the further proviso, that Mr. Towar should at all times have the right to inspect the books and accounts of the obligors. That on the 1st November, 1839, Haswell, Barrington & Haswell executed articles of copartnership, wherein it was stipulated that neither of the said parties should use the notes or paper of the firm for their private responsibilities, or in their individual capacity engage in any contract, &c., that could, in the remotest degree, prejudice the interests of the firm. That on the 3d September, 1840, another agreement was executed between the parties, which, after reciting the inability of the firm to comply with their engage-

ments with the complainant, provided, that he should be at liberty at any time to enter up judgment on his bonds and to issue execution thereon; and fixed the amount then due to him at $43,600,21.

The bill then set forth that by an agreement dated the 21st July, 1841, John J. Haswell withdrew from the firm; and the remaining partners promised and agreed with complainant, that *they would not give any judgment or other lien on their joint property or stock in trade that would be prior or detrimental to the claim of the complainant.* That on the 10th April, 1844, Barrington & Haswell gave to the complainant an additional bond and warrant of attorney in $16,000, conditioned for the payment of $8,000, with interest at five per cent. That on the 7th March, 1846, John J. Haswell departed this life, and George D. Haswell obtained letters testamentary as executor of his estate. That at the time of exhibiting this bill, the amount due to complainant was $26,000. That, on the 21st October, 1850, the said Barrington & Haswell, being largely indebted to other persons, and being insolvent both individually and as a firm, in violation of their agreements with complainant, and with intent to evade the provisions of the acts of 17th April, 1843, and of 16th April, 1849, executed a bond and warrant of attorney to Mary Ann Haswell, the widow of John J. Haswell, in $19,425,82, conditioned for the payment of $9,712,91, upon which judgment was entered in the office of the prothonotary of the supreme court, and a *fieri facias* immediately issued thereon, by virtue of which the sheriff had levied on all the personal property of the defendants. That no debt was then due by the said firm to Mary Ann Haswell. That on the 21st October, 1850, Barrington & Haswell executed to Thomas Bell a general assignment in trust for all their creditors, without preference. Wherefore, the complainant prayed, *inter alia*, that Mary Ann Haswell might be restrained from proceeding upon her said execution, and that the levy might be set

aside; and that Thomas Bell might be restrained from proceeding under the assignment, and that the same might be set aside and avoided.

The defendants, in their several answers, admitted the execution of the instruments recited in the bill; but averred that the bond and warrant of attorney to Mary Ann Haswell were, *bonâ fide*, given to secure debts justly due; that at the time of their execution, Mary Ann Haswell executed a declaration of trust, annexed to the warrant of attorney, wherein she declared that she held said bond and warrant of attorney in trust for herself, and certain other specified creditors of Barrington & Haswell, they being all the creditors of the said firm, *except the complainant*. Among the list of creditors are the names of the assignors as executors respectively of the estates of J. J. Haswell and Michael Connor. The answers averred, that these debts were justly due, and that the indebtedness to Mary Ann Haswell appeared on their books, to which complainant had access; that the bond and warrant of attorney were not given to Mary Ann Haswell in fraud of creditors or of the acts of assembly. That the bonds and warrants, and agreements formerly given to Mr. Towar had, at his special instance and request, always been kept concealed from the other creditors, who, in entire ignorance thereof, had given them credit. Mrs. Haswell and Mr. Bell denied all knowledge of the bonds and agreements with Towar. Mrs. Haswell further denied that, when she received the bond and warrant of attorney, she knew of the insolvency of the obligors, or had the least reason to suppose they intended to make an assignment. Mr. Bell likewise positively denied that at the time when the assignment was executed, he had any knowledge of the bond which had been given to Mrs. Haswell.

The complainant also obtained, on the common law side of the court, a rule to show cause why the execution in favour of Mrs. Haswell should not be set aside; in support

of which depositions were taken, which in no respect conflicted with the statements in the defendants' answers. The motion for a special injunction, and rule to show cause, were argued together.

H. M. Phillips and *Perkins*, for complainant, contended, that the judgment in favour of Mrs. Haswell was void as against complainant, in law and in fact. It is void in fact, because confessed to prefer the obligors; *Irwin* v. *Keen*, 3 Wh. 347. It is void in law, because in violation of the statute of 13th Eliz., and the 14th sect. of the act of 16th April, 1849, (Pamph. p. 664;) *Hart* v. *M'Farland*, 1 Harris 182. It was intended, by the acts of 1843 and 1849, to prevent preferences by an insolvent, in any manner; the decisions in *Blakey's Appeal*, 7 Barr 449, and *Lea's Appeal*, 9 Barr 504, occasioned the change in the law made by the act of 1849. The assignment is void because fraudulent in fact; the transactions show the intention of the assignors to prefer all their creditors, except complainant, and the assignment thus operating only to hinder and delay *him*, is clearly within the statute of Eliz. It was intended to reach the surplus after payment of the judgment. But the agreement with complainant prevents the assignors from making either judgment or assignment to his prejudice. An assignee in trust for creditors stands in the shoes of his assignor: he is not a *bonâ fide* purchaser. *Pierce* v. *M'Keehan*, 3 W. & S. 283; *Luckenbach* v. *Brickenstein*, 5 W. & S. 149; *Vandyke* v. *Christ*, 7 W. & S. 373; *Wilson's Accounts*, 4 Barr 430; *Ludwig* v. *Highley*, 5 Barr 132. By the confession of judgment and execution levied, the property passed out of the debtors, and they had either nothing to assign, or only the surplus, after payment of the judgment. This goes to establish the frauds complained of; and the law makes such transactions fraudulent, *per se; Seal* v. *Duffy*, 4 Barr 274.

[Towar v. Barrington.]

R. K. Scott and *C. Fallon*, for M. A. Haswell and Barrington & Haswell; and *J. Fallon*, for Bell.—The answers are to be taken as verity, no evidence having been taken to contradict them; especially as they are responsive to the charges in the bill; 1 Sm. Ch. Pr. 271, 272, and notes; 8 Ves. 35; 4 Paige 111; 5 Paige 112; 6 Paige 295; 1 Sm. Ch. Pr. 596, 601. The bond and warrant, and assignment are alleged to be entirely separate and distinct transactions. Every single allegation upon which complainant asks for equitable relief, is positively and distinctly denied by all the defendants, with the single exception of the execution and delivery of the several instruments to Towar, as to which defendants deny all knowledge until after the bond to Mrs. Haswell and the assignment to Mr. Bell were executed. Even had Barrington & Haswell designed a fraud, the other parties, having had no notice, cannot be affected by it; *Magniac* v. *Thompson*, 7 Peters 348, 360. The bond in no way enured to the benefit of the obligors except in a representative capacity; and where two rights meet in the same person, they are to be viewed as if they existed in different persons; *Allison* v. *Wilson*, 13 S. & R. 333; *Prevost* v. *Gratz*, 1 P. C. C. 373; *Marshall* v. *Hoff*, 1 Watts 440; *Petrie* v. *Clark*, 11 S. & R. 377; *Appleton* v. *Donaldson*, 3 Barr 387; *Depau* v. *Waddington*, 6 Wh. 220. The cases of *Irwin* v. *Keen* and *Hart* v. *M'Farland*, cited for complainant, do not apply; those were cases of actual fraud. Barrington & Haswell have denied their insolvency and all intent to evade the provisions of the acts of 1843 and 1849. In order to avoid the assignment as to Bell, he must have participated in, or have had knowledge of, the intended fraud; *Magniac* v. *Thompson*, 7 Peters 361; *Mackie* v. *Cairns*, 1 Hopk. Ch. 373. It cannot be pretended that the agreement of 1838 actually vested an interest or estate in the debtors' effects in the complainant; and to say that innocent creditors, selling their goods in entire ignorance of such an agreement, are to be affected by it, in

order that their goods might be drawn into the vortex of the trust, is to rely on a fraud too gross to require more than an exposure. The cases cited for the complainant are wholly inapplicable. The bond and warrant to Mrs. Haswell do not constitute an assignment of the estate, which remained in the debtors, subject to the levy, which was not their act; and this distinguishes the case from *Seal* v. *Duffy*, a distinction recognised in *Blakey's Appeal*, 7 Barr 449.

The opinion of the court was delivered by

Bell, J.—I am unable to recognise any ground, presented by the pleadings and proofs, upon which the assignment made by Barrington & Haswell to Bell, can be successfully impeached. True, objections have been presented, but in my apprehension, none of them are sustainable.

The first is, that it is void under the statute of Elizabeth, as operating to hinder and delay the creditors of the assignors. Regarded generally, it operates no further to delay creditors than all similar assignments made by persons in insolvent circumstances. And yet these have never been esteemed as falling within the purview of the statute making fraudulent conveyances void. On the contrary, they are viewed as a means of effecting a distribution of the debtor's property among his creditors, in satisfaction of their several claims, and this in furtherance of a duty incumbent upon him. Where even a preference was given, by these instruments, to one creditor or class of creditors, before another, it was held not to be fraudulent, either at common law, or under the statute, and it required the intervention of the legislature to make it so.

But it is said the assignment before us stands upon ground peculiar to itself: that it must be considered in connexion with the judgment confessed to Mrs. Haswell, in trust for all the creditors of the assignors except the complainant, and so considered it exhibits a clear intention by

them to delay him, in favour of all others. This position is deduced from the assumption that the assignment, notwithstanding the comprehensiveness of its terms, was intended to cover only the surplus remaining after payment of the Haswell judgment. I find no warrant for this assumption, either in the language of the instrument itself, in the circumstances attending the transaction, or in the answers of the defendants, which, as the case stands, must be accepted as true. The assignment purports to convey all the estate and effects of the grantors, for the benefit of all the creditors, equally, and the mere fact of the prior confession of judgment could not interfere with its legal operation, inasmuch as that judgment conveyed no interest in the property of the defendants, nor constituted a lien upon it. There is, therefore, nothing in this fact, standing alone, showing an intent by the assignors to postpone the complainant; and they swear they entertained no such intent. Besides to avoid a deed, under the statute of Elizabeth, it must be shown that both parties to it intended the forbidden fraud. This is clear from the cases of *Magniac* v. *Thompson*, 7 Peters' R. 361, and *Mackie* v. *Cairns*, 1 Hopk. Ch. 373. Now, it is evident, the confession of the judgment and the execution of the assignment were distinct and independent transactions. Mr. Bell says, he had no knowledge whatever of the judgment until after the assignment was made, and Mrs. Haswell avers, she knew of no intention to make an assignment, when the bond and warrant to confess judgment was executed to her. If, then, such a fraudulent intent as is now imputed to the assignors had existence, it is clear neither the judgment creditor nor assignee participated in it. There is, consequently, nothing in this feature of the case, to withdraw it from the general principles applicable to such assignments.

It is, secondly, urged that, as against the complainant, the assignment is void by force of the assignors' agreements that "Haswell, Barrington & Haswell would not give

any judgment or other lien on their joint property or stock in trade, that would be prior or detrimental to the claim of the said Alexander Towar," or "that the said obligors would not assign, or in any way dispose of their stock or effects to any person or creditor in prejudice of said Towar, and that every such assignment or transfer should be void as to him." These agreements were carried in Mr. Towar's pockets for several years, in purposed secrecy, while the debtors were permitted to trade with the world as if they had been free men, unencumbered. During this interval the very debts which the assignment is intended to cover, were created, *bonâ fide*, in the usual course of business, with the ostensible owners of the stock and effects, now claimed to be exclusively applicable to the payment of Towar's debt. Surely, under these circumstances, such secret agreements ought not to be permitted to work an effect so unjust as that now claimed for them. Without precedent authority, I should be prepared to say, that setting them up after the lapse of years, in bar of innocent creditors, who acted in entire ignorance of them, more especially where it appears the secrecy was of set purpose to give the debtors a false credit, involves something so like fraud that no judge could give his sanction to it. But I am relieved from simple dependence on my own impressions by the principle, authoritatively settled, that a chancellor will never exercise his discretion in giving effect to executory agreements, in detriment of the rights of innocent third persons, without notice; a principle which is illustrated by *Orby* v. *Trigg*, 9 Mod. 2, 3, where a covenant to let a mortgagee have the estate in case it was to be sold, was not allowed to affect an intervening purchaser without notice. I refer to this case, because it is cited, with approbation, by the present chief justice, in an able opinion delivered by him in *The Insurance Company of North America* v. *The Union Canal Company*, 2 Penn. L. J. 65, (*ante*, 53) where, also, the principle I have noted was acted on. Though

an assignor is a volunteer, and not a purchaser for value, yet he is, as was ruled in *Seal* v. *Duffy*, 4 Barr 274, a trustee for the creditors, and I see not why they may not enforce their rights, if they choose to do so, through him.

It is, however, further contended, that by the confession of judgment, and execution forthwith issued, the property had passed out of the debtors, and they had either, first, nothing to assign, the goods belonging to the sheriff by virtue of his levy; or, secondly, only the surplus, after payment of the amount of the judgment. The latter portion of this proposition has been already answered, at least in part, and this conveys, also, a partial answer to the first branch of the proposition. The bond and warrant to Mrs. Haswell, and the entry of judgment thereon, as already intimated, transferred no property in the debtors' goods and effects, subsequently assigned. The execution afterwards issued was the work of the creditor, not of the debtors. It is true, it operated to vest an interest in the sheriff, sufficient to enable him to pursue the goods levied, in the hands of a trespasser. But, until sold, the property of the judgment debtors was not wholly divested. It remained in them subject to the levy, and was at their disposal, burdened with the encumbrance. Upon payment of the execution or the withdrawal of the levy, the alienee holds the goods altogether free of the lien, and has a plenary property in them, by virtue of the transfer, without more. In fact, what is usually called property in the sheriff is a qualified interest, depending on the levy. That being gone, all semblance of property is gone with it. It results, then, in this; if the judgment and levy be good, the execution creditor has a claim upon the proceeds of the goods levied, superior to either the assignee or the plaintiff in the present proceeding. If the levy be withdrawn, or for any cause, be found insufficient, the property assigned passes to the assignee, free of encumbrance. Now the complainant avers the illegality of the levy, and if upon any ground advanced

by him, which does not impute fraud to the assignee, it be set aside, it is difficult to perceive how the complainant can be permitted to set it up as sufficient to intercept the transfer of the property to the assignee, even if such were otherwise its legal effect. But, as already said, it works no such consequence. An execution and levy is entirely compatible with a continued property in the debtor, sufficient, at least, for every purpose of sale and transfer. There is nothing in *Seal* v. *Duffy* impeaching this view. That was the case of a fair assignment, good against the assignor and acquiescing creditors, to pass the property of the things assigned. It is upon this distinct ground that decision proceeds. The difference is, that here the levy does not pass the property.

From what has been said, it will be perceived I am of opinion the assignment to Bell is operative to vest the property assigned in the assignee, for the equal benefit of all the creditors. He will, consequently, so take unless the prior levy and a sale under it should be found sufficient to prevent this. It would seem, therefore, to be the business of the assignee, as the representative of all the creditors, to contest that levy, and he has, in fact, offered to do so, provided the now plaintiff, recognising the assignment as valid, desires it. The plaintiff declines the condition, under the idea that both the execution and assignment are void as to him. We have seen that, with regard to the assignment, this is an error. Yet I do not perceive why he may not be permitted to contest the first levy, as one having an interest under the assignment. But in doing so he must be regarded as standing upon the assignment, and claiming the benefit of its legal operation.

He attacks the judgment and execution on three distinct grounds. 1. As fraudulent in fact. 2. As fraudulent in law, under the statute of Elizabeth. 3. As being so under our several acts of assembly regulating this subject.

1. By the bill, it is averred the judgment was collusively

entered, and with a view to defeat creditors, no debt being, in fact, due to Mrs. Haswell. The answers and exhibits, however, fully disprove this allegation, and it is now abandoned. The averment of actual fraud is, therefore, left to rest solely on the fact that among the debts proposed to be secured by this judgment, there are two represented by the defendants themselves; one of these being due to George D. Haswell, as executor of the estate of John J. Haswell, deceased, and the other to Edmond Barrington, as administrator of the estate of Michael Connor. Now it is undoubtedly true that an attempt by a failing debtor to reserve an interest to himself, under colour of a transaction purporting to be for the benefit of his creditors, or any of them, avoids the whole transaction, whether this be by way of assignment or confession of judgment. This is the doctrine of *Irwin* v. *Keen*, 3 Wh. 247, and *Hart* v. *M'Farland*, 1 Harris 182. And it is based on the evidence afforded of an intention to commit an actual fraud. But there is no such feature, in the case before me. It is in uncontradicted evidence that the several sums for which the judgment is a security to Haswell & Barrington, were received by them in their respective characters of executor and administrator, and by them invested in the business of the firm of which they were members, the firm having full knowledge of that fact. Under such circumstances, I think, equity would follow the fund in the hands of the debtors, and if so, there is no rule which would prevent the debtor from securing it himself. But on another ground, this part of the transaction is sustainable. "It is a maxim, that where two rights meet in the same person, they are viewed as if they existed in different persons." *Allison* v. *Wilson*, 13 S. & R. 333; *Petrie* v. *Clark*, 11 S. & R. 377; *Depau* v. *Waddington*, 6 Wh. 220. The law treats them as distinct individuals. Now here were debts due from Barrington & Haswell, as traders, to Barrington & Haswell, respectively, in their

distinctive characters of executor and administrator. In the latter capacity, they are to be regarded just as though they were other natural persons, and, fraud being out of the way, are entitled to stand as distinct creditors of failing debtors. There is nothing in the doctrine that a personal representative is vested with the personal chattels and *choses* in action of a decedent which militates against this. His representative character may always be averred, where justice and propriety require it, in a case situate like the present.

Secondly, the position that the judgment is fraudulent in law, under the statute of Elizabeth, is equally untenable. Neither at common law, nor under the statute, was there any principle which prohibited an insolvent man from preferring one creditor before another, by a confession of judgment, with a view to immediate execution. This was so held in *Blakey's Appeal*, 7 Barr 449, even after our act of 1843, forbidding preferences in assignments.

But, thirdly, the act of 16th April, 1849, contains a *proviso*, which, though most awkwardly constructed, admits of no other interpretation than the manifestation of an intent to prohibit even *bonâ fide* judgments and liens being acquired against the property of an insolvent debtor, with intent to give a preference over other creditors. This construction, it is true, is by implication, but it is a necessary one, and, therefore, as strong as though the language were direct.

Now, in the instance before me, though the defendants, Haswell & Barrington, deny by their answer, an intent to prefer the creditors named in the declaration of trust, signed by Mrs. Haswell, and aver that their object was, simply, to place those creditors on an equal footing with Towar; and the defendant, Mrs. Haswell, denies all knowledge of the debt due to Towar, when the bond was executed to her; I cannot shut my eyes upon the fact that when that bond was made, an immediate execution of the judgment to be entered upon it was in the contemplation

of all the parties to the transaction. True, this design may not have been imparted to the debtors in terms, but it is impossible to believe they did not expect it. In giving the judgment they may have been chiefly actuated by a desire to put their remaining creditors in a position as favourable as that occupied by Towar, holding warrants of attorney to confess judgments. They may not have intended to violate the provisions of the acts of 1843 and 1849, "*of which they had no knowledge.*" But they must have known that a first levy would give an advantage, and when they confessed a judgment, without stay of execution, omitting to give notice thereof to Towar, in violation of their written stipulation, it is incredible that they did not anticipate an execution, and the legal consequences which flow from a levy. Indeed, there is no attempt at a denial of this. The defendants merely say, that of their own motion, by the confession of the judgment, they did not place the general creditors in a better situation than that enjoyed by Towar; and that they had no intention to violate the acts, because they knew not of them. But if they contemplated putting it in the power of Mrs. Haswell, as the general representative of the other creditors, to steal a march upon Towar, or any other creditor, it is enough, though they never heard of the acts prohibiting it. It is so even on the concession that Mrs. Haswell knew nothing of Towar's debt, for under our acts an intent to prefer entertained by the debtor is enough. Without entering upon detail, it may be sufficient to say that looking to the whole transaction, and the circumstances that surround it, I have no doubt that the probability, nay, almost certainty, of an immediate execution was in the minds of the parties, and the effect of it well understood. That execution, as being the instrument of preference, is, therefore, within the purview of the act of 1849. To give due effect to that act, the writ must be restrained. Yet as this conclusion is only in favour of all

the creditors represented by the assignee, the judgment representing at the same time all the creditors but Towar, the injunction against the execution will only be granted on condition that Towar also relinquish his execution and levy, and agree to come in under the assignment. This is the necessary result of the recognition of the assignment and of Towar's position in court, as one protected by it.

As all the parties are before me, presenting their conflicting rights, I am in possession of the whole subject, and may make such a decree as will quiet the controversy altogether. This can only be done by compelling all the creditors to come in under the assignment. An analogous case is where there has been a decree for the distribution of assets, in the hands of a trustee. There, a court of chancery will restrain a creditor, even though he be not a party to the suit, from proceeding at law for his own individual debt. This it does, because having taken the fund into its own hands, it will administer it equitably, and not permit the trustee to be pursued at law; and an injunction may be granted on the application of an executor, heir, legatee or creditor. This it does because it considers the decree in the nature of a judgment for all the creditors. *Martin* v. *Martin*, 1 Ves. 211; *Morrice* v. *Bank of England*, Cas. Temp. Talb. 217; 2 Bro. P. C. 465; *Dyer* v. *Kearsley*, 2 Mer. 482, n; *Brooks* v. *Reynolds*, 1 Bro. Ch. 183; 2 Swanst. 545; 3 Daniel's Ch. Pr. 298. Here, we have the assignment, in lieu of a decree, and equally efficacious; and the creditors to be restrained are parties before the court. It will be decreed accordingly.

And now, to wit, March 15th, 1851, the complainant, Alexander Towar, having filed a paper, agreeing that the writs of execution issued by him against the defendants, Barrington & Haswell, be set aside, and that the complaint against Thomas Bell be dismissed, and the assignment to said Bell, by the said Edmond Barrington and George D. Haswell be maintained and established; it is ordered and

decreed, that the bill be dismissed, so far as regards the defendants, Edmond Barrington, George D. Haswell, and Thomas Bell, and that Mary Ann Haswell be enjoined and restrained from setting up or proceeding with the execution now outstanding upon her judgment against said Barrington & Haswell; and that the costs be paid by Thomas Bell out of the assigned estate.

The rule to set aside the execution was made absolute, upon the same terms as are contained in the foregoing decree.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

Lockington's Case.

[NOVEMBER 23, 1813.]

The judges of the state courts have authority to issue writs of *habeas corpus* to bring up the bodies of persons committed to prison under the asserted authority of the United States.

The act of congress of July 6, 1798, authorized the president to direct the confinement of alien enemies, although such confinement or restraint was not for the purpose of removing them from the United States.

The act having authorized the president to direct the confinement of alien enemies, necessarily conferred on him all the means to enforce his orders; and the marshals of the districts were the proper persons to execute such orders.

It was not necessary that the judicial authority should be called in to enforce the regulations of the president, in respect to alien enemies; and the marshal might act without such authority.

HABEAS CORPUS, returnable before the chief justice, directed to Joseph Cornman, keeper of the debtors' apartment of the prison of the city and county of Philadelphia, commanding him to produce the body of Charles Lockington, by him detained in prison. The facts of the case sufficiently appear in the opinion of the chief justice.

[Lockington's Case.]

The case was argued by *Mr. Hare*, for the prisoner, who cited 2 Inst. 57; *Magna Charta*, c. 30; Vattel, b. 3, c. 4, § 63; 10 Johns. 69, 117, 328; *Olmsted's Case*, ante, p. 9.

Mr. Dallas, district attorney of the United States, cited Act of 6th July, 1798; Act of 6th July, 1812, § 6; Vattel, b. 3, c. 17, §§ 269, 273, 274, 276; 2 Burr. 765; 2 Bl. Rep. 132; Doug. 403; 9 Johns. 239; 2 Hall's Law Journ. 192; 1 Johns. Cas. 136.

TILGHMAN, C. J.—From the return to this writ of *habeas corpus*, and the evidence which has been produced, it appears, that Charles Lockington, who is a subject of the British king, came into the United States before the declaration of war, and has never been naturalized. His business was connected with commerce; and on the 18th of July, 1812, he reported himself to John Smith, marshal of the district of Pennsylvania, as an alien, and British subject. On the 19th of March, 1813, he applied, as an alien enemy, for the marshal's passport, to repair to Lancaster, which was granted; and, at his own request, afterwards changed to Reading; in pursuance of an order issued from the office of the secretary of state, by which all alien enemies (with certain exceptions, not including the case of Mr. Lockington) were directed to retire to a place above forty miles from tide water, to be designated by the marshal. On the 9th of the present month, the marshal found Mr. Lockington in this city, in violation of the order above mentioned; upon which he required him to retire to Reading. This being refused by Mr. Lockington, the marshal took him into his custody, and placed him, for safe keeping, in the debtors' apartment of the prison of the city and county of Philadelphia, until he could be conveyed, or would consent to retire, to Reading, or should be discharged by due course of law. The reason assigned by Lockington, for coming from Reading to Philadelphia, was

the want of money to subsist in Reading; and he offered to return thither, if the marshal would furnish him with money. War having been declared by the congress of the United States, on the 18th of June, 1812, proclamation of that event was made by the president on the day following. On the 7th day of July, in the same year, a notice was issued from the department of state, and published in those newspapers in which the laws of the United States are published, by which all British subjects were required to make report of themselves to the marshals of the districts in which they resided; and, at the same time, the several marshals were directed to cause the laws which relate to alien enemies, to be published, in order that such persons might be informed of the situation in which they stood. Those laws were accordingly published. On the 23d of February, 1813, an order was issued from the department of state, and published in the newspapers, by which "alien enemies, residing or being within forty miles of tide water, were required forthwith to apply to the marshals of the states or territories in which they respectively resided, for passports, to retire to such places, beyond that distance from tide water, as should be designated by the marshals," subject to certain exceptions, not affecting the present case. At the same time, the several marshals of the United States received instructions from the department of state, to take into custody, and convey to the places assigned to them, all persons to whom the said requisition was applicable, and who did not immediately conform to it. On the 15th of April, 1813, the several marshals were informed, by a notice from the department of state, that the president had appointed John Mason, Esq., commissary general for prisoners of war, "including the superintendence of alien enemies;" and that, in future, all letters and documents on those subjects were to be addressed to that gentleman; and all instructions from him in relation to the same, were to be obeyed, unless other-

wise directed from the department of state. On the 31st of May, 1813, a circular letter, signed by John Mason, was addressed to the several marshals of the United States, and published in the newspapers. This letter was dated "Office of Commissary General of Prisoners, Washington, May 31, 1813," and is expressed in the following form: "The president being desirous of defining more particularly, the treatment of alien enemies, and of extending as much indulgence to them as may be compatible with the precautions made necessary by the present state of things, directs, that, in regard to such as may be within your district, you will be governed by the following rules. You will cause to be removed, as heretofore prescribed, if not already done, under the former orders from the department of state, all who are not females or under eighteen years of age, who are not labourers, mechanics or manufacturers, arrived in the country previous to the declaration of war, and actually employed in their several vocations; subject, however, to the following modifications." Then follow the modifications, none of which apply to Mr. Lockington. These are all the facts of any importance on the present question.

It has been contended, that the orders issued from the public offices are not to be considered as the acts of the president; and that, if they are his acts, they are not authorized by law. Both these objections shall be considered; but I shall first advert to the point, introduced in the suggestion filed by the marshal, which goes to the jurisdiction of a state judge, in cases like the present. It is supposed that the state judges have no authority to issue a writ of *habeas corpus*, because the power of declaring war being vested in the congress of the United States, all matters appertaining to that subject must be under their control; that congress, if it had pleased them, might have considered alien enemies as prisoners of war, who are not entitled to the benefit of a writ of *habeas corpus;* and,

finally, that as the laws of the United States have given to the state judges a certain jurisdiction, with respect to alien enemies, (which I shall have occasion to mention hereafter) but have not given to them authority to interpose by a writ of *habeas corpus*, that writ ought not to be issued. In answer to these suggestions, it is to be observed, that the authority of the state judges, in cases of *habeas corpus*, emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States have given them jurisdiction; but that congress possess, and have exercised, the power of taking away that jurisdiction, which the states have vested in their own judges. Our act of assembly directs, that, in all cases "where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any colour or pretence whatsoever," he shall be entitled to a writ of *habeas corpus*. Now, it is no answer to this law to say, that, being made before the present constitution of the United States was established, it could not be intended to apply to cases arising under the constitution. The people of Pennsylvania still remain citizens of the commonwealth, as well as of the United States; and it is of as much importance to them to be relieved from unlawful imprisonment, under colour of authority derived from the United States, as from any other imprisonment. When the present federal constitution was adopted, the people were not easy until they had obtained an amendment, declaring that the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people. A writ of *habeas corpus* must, therefore, be issued in all cases where the right to issue it has not been given up to the United States. That this right has not been given up, was my opinion, delivered in the case of *Olmsted*, where I assigned reasons which I

shall not now repeat. But this is not all. It is a principle well established, that even in cases where congress might assume an exclusive jurisdiction, the authority of the states remains until such a jurisdiction is assumed. There are many instances in which the powers of the United States are suffered to lie dormant; such as the power of establishing uniform laws on the subject of bankruptcies; and, while the power remains dormant, the several states regulate the subject. In subjects also within the jurisdiction of congress, when they do legislate, the authority of the states is taken away only so far as the law of the United States declares. This is exemplified in the act establishing the judicial courts of the United States, where it will be found, that in some instances the courts of the United States are vested with an exclusive jurisdiction; but in many more they have jurisdiction concurrent with the courts of the several states. And although it is true, that, by the terms of the act, the courts of the United States have only a concurrent jurisdiction, yet I apprehend the construction would be the same, if the express terms had been omitted. By the 14th section of the same act, power is given to the judges of the United States to grant writs of *habeas corpus*, for the "purpose of an inquiry into the cause of commitment; provided that they shall in no case extend to prisoners in jail, unless where they are in custody under, or by colour of the authority of the United States, or committed for trial before some court of the same, or are necessary to be brought into court to testify." Now, if it had been intended to exclude the state judges, this is the place in which we might expect to find evidence of such intention: for, the subject was full in the mind of the legislature, as appears by the care with which they restrained their own judges from interfering with commitments not under the authority of the United States.

The judicial power of the United States extends to all cases in law or equity, arising under the constitution, the

laws of the United States, and the treaties made under their authority. Supposing that congress had the right to assume an exclusive jurisdiction in all cases founded immediately on these subjects, the exercise of it would be intolerably grievous, without a great increase of courts and judges; and, even then, it would often happen, that the state courts would have to decide on the constitution, laws and treaties of the United States, on questions arising collaterally, in causes within their jurisdiction. Still, the authority of the United States may be preserved, by retaining, as they have retained, an appeal to their own courts. But it seems to be the general opinion, that from a decision on a *habeas corpus*, no appeal or writ of error lies; and thus, points of vital importance to the United States may be determined by state judges, without an opportunity of revision. This may certainly be a very serious evil, but it does not appear to be without remedy. For, although by the general principles of law, an appeal or writ of error might not lie; yet the subject being within the power of congress, they may regulate it as they please. As to an attempt to take away from the state courts altogether the right of issuing a writ of *habeas corpus*, in any case where a man pretends to justify an imprisonment under the authority of the United States; whenever the subject shall be brought before congress, it will be found to be attended with very great, if not insuperable difficulties.

I have said thus much on the point of jurisdiction (although I consider it as having been long settled and acted upon by the supreme court of this state) because some persons of high standing in other states, for whose opinions I entertain the most sincere respect, have expressed doubts on the subject. It is a matter deserving the greatest consideration, in which the people of the different states are deeply interested. The inconvenience of clashing opinions between federal and state judges, may sometimes be felt; but when I consider the situation of a Pennsylvanian, im-

prisoned unlawfully, by colour of a pretended authority from the United States, on the banks of the Ohio, or the shore of Lake Erie, with only one federal judge to whom he can apply, and that judge in the city of Philadelphia, I feel as little inclination as I have right, to surrender the authority of the commonwealth.

But there is another objection to this *habeas corpus*, applicable equally to the judges of the states and of the United States: it is, that Mr. Lockington is in the situation of a prisoner of war. If he be so, he is not entitled to a privilege which never could have been intended for persons of that description. A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection. His object was to injure us; and we bring him hither solely for safe keeping. Far different is the case of a great body of people, who, although now placed in the situation of enemies, by events over which they had no control, yet, in their hearts may bear no enmity to the United States: nay, who may even prefer this country to their native soil. Many of them came among us, with a view of sharing our fortunes. Our laws held out invitations: they were suffered to acquire property, personal and real; we permitted them to swear that they intended to renounce their native sovereign, and become fellow citizens with us. Many, it is true, came merely on business, without such intent, and may be really inimical. But even they had that implied promise, which civilized nations have long been supposed to make, that, in case of sudden war, there should be permission to depart in a reasonable time, without injury to person or property. I am far from denying, however, that the condition of these people is to be decided, not by a reference to the usual courtesy of nations, but by our own laws. Congress had

the power of legislating on the subject: they have exercised that power; and their acts are paramount to all foreign customs. It is these acts which we are now to consider, and it will be found that they are such as the most civilized nation need not blush to avow. They preserve a sacred regard for treaties; and, in cases where no treaty exists, they vest the president of the United States with full powers, to be exercised "according to the dictates of humanity, and national hospitality:" not forgetting, however, a due regard to the public safety. It has lately been decided, by the supreme court of New York, in the case of *Clarke* v. *Morey*, 10 Johns. 69, that British aliens residing in the United States, so far from being considered as prisoners of war, may sue and be sued, as in time of peace.

The act respecting alien enemies was passed on the 6th of July, 1798. In considering it, I shall not pursue the wide range which was taken in the argument of this case. In fixing its true construction, it is of no importance under what administration it was enacted; by whom it was brought forward; or by whom advocated or opposed, on its passage. It is the law of the land; and, being so, it becomes the duty of every individual to obey, and of every court to enforce obedience.

It begins by enacting, that when war is declared, or invasion by a foreign nation is perpetrated, attempted or threatened, and the president of the United States shall have made public proclamation of the event, "all natives, citizens, denizens or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies." Here is a broad proposition, standing as a foundation for summary proceedings against persons who are declared to be in the situation of alien enemies. I do not consider, as has been contended by Mr. Lockington's counsel, that the

apprehending, restraining and securing, here mentioned, are to be intended solely for the purpose of removal out of the United States. It is a provision for the public safety; which may require that the alien should not be removed, but kept in the country under proper restraints; and the nature and degree of these restraints, in cases where there has been no misbehaviour, may depend, in some measure, on the treatment which the hostile government gives to citizens of the United States who may chance to be within its power. The act then proceeds to declare, that "the president of the United States shall be authorized, in any event as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States toward the aliens who shall become liable as aforesaid; the manner and degree of the restraint to which they shall be subject; and in what cases and upon what security their residence shall be permitted; and to provide for the removal of those who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises, and for the public safety." Then follows a proviso for securing the observance of treaties, which is not material in this case; because, at the time of the declaration of war, there was no treaty regulating the subject in existence between the United States and Great Britain.

In the second section of the act it is enacted:—"That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively authorized, upon complaint against any alien enemy, or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or in-

tent of such proclamation, or other regulations which the president of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens, to be removed out of the territory of the United States, or to give sureties for their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed."

It cannot be doubted, but that the provision in the first section, considered without reference to the second, authorizes the president to establish a regulation that all alien enemies of a certain description, shall retire immediately to a place to be appointed by the marshal; and that, in case of non-compliance, the marshal shall remove them. But the second section, having authorized certain courts and judges, upon complaints made against alien enemies, to have them apprehended and brought before them; and, after hearing, to make such order as may be necessary for carrying the regulations of the president into effect; there is not wanting strong colour for an argument, that the only manner of executing the regulations is by complaint to a court or judge. This is a point well worthy of serious consideration. I have considered it attentively; and I shall give the reasons which have induced me to conclude that, notwithstanding the second section, the president was authorized to make an order for the removal of the alien enemy by the marshal, in the first instance. It is never to be forgotten, that the main object of the law is, to provide for the safety of the country from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies. It is

well known that the United States are exposed to great danger in a war with an enemy who commands the sea. Bounded by the Atlantic ocean to a great extent, with numerous bays and navigable rivers, penetrating the very heart of the country, there is no knowing when, or where, the attack may be made. Without incurring the charge then of undue severity, prudence might require, that alien enemies residing in large cities, should be removed with more expedition than the formalities of law admit. The president, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety, so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse: but that was a matter for the consideration of those who made the law, and must have no weight with the judge who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people who wish to preserve their freedom, that, from necessity, the hands of the executive power must be made strong, or the safety of the nation will be endangered.

But, it may be asked, what is the use of the provision in the second section, concerning courts and judges, if the regulations of the president may be executed without resorting to them? The answer is, that the use is great. In the first place, where the marshal is ordered to make the removal, he is at liberty to apply to the judges; and there may arise cases, in which he will find it prudent to strengthen himself by the judicial authority. But, besides, many regulations may be made, which contain no order for the marshal to act, or which may direct him to proceed by way of complaint to the judges. If the regulation in question had simply been, that alien enemies should retire

to a place to be appointed by the marshal, any citizen might have complained of an alien enemy who declined to comply; and a judge might have made and enforced an order for his removal. There may be various regulations for the general conduct of alien enemies, without pointing out the mode of carrying them into effect; and in all such cases, the courts may take cognizance of them. There may be regulations which barely order that certain things shall be done, or shall not be done, without defining the penalty in case of disobedience. In such cases, the judges to whom complaint is made are vested with a considerable discretion. They may, according to the nature of the case, either direct the alien enemy to be removed out of the United States, or to give security for his good behaviour, or to be imprisoned until the order of the president is complied with. It would be a waste of time to point out all the uses of this provision, respecting the power of courts and judges. To those who reflect on the subject, many more than I have mentioned will suggest themselves. It is worthy of remark, that in the third section of the act, it appears, that the president may, by his warrant directed to the marshal order him to apprehend any alien enemy, and remove him out of the territory of the United States. Now it is difficult to conceive a reason why the president should be authorized to remove any alien enemy out of the country, without assigning a cause; and yet that he should not be permitted to direct that those of a certain description should repair to a certain place within the United States, and in case of a refusal, that the marshal should remove them. The particular reason assigned by Mr. Lockington for not complying with the order of the president, I cannot but very much regret. But, although it absolves him from the charge of obstinate and perverse disobedience, yet it can have no effect on my judgment, as it is a subject on which I have no power to act. I am not without hopes, however, that this public discussion may bring to the mind

both of our own and the British government, a matter which seems not to have been attended to: that is to say, that persons detained in a foreign land, cut off from their friends, and without the opportunity of pursuing their usual occupations, may be involved in distress which demands relief.

But, supposing the president had power to make the regulation under which the marshal has acted, it is denied that he ever did make it. The act of congress requires, that the president should establish regulations, by his proclamation or other public act. He has made no proclamation; but has he not made a public act? The first order was issued from the department of state, although it does not appear to be signed by the secretary of state, nor is the name of the president mentioned in it. The attorney for the United States says, that the orders of the president are usually communicated in this form. If the matter rested on this notification, I should be somewhat at a loss what to think of it. The president could not transfer his power to the secretary of state; and as there is no mention of his name, some evidence might be necessary, to show that it was really his order issued from the department of state. But the order issued from the commissary general of prisoners puts the matter out of doubt; for the regulations there established, which refer to and adopt the former orders from the department of state, are expressly declared to be the act of the president, although they are not signed by him, but by the commissary. This is sufficient to satisfy me. Being published as the orders of the president, signed by an officer of high trust, and never disavowed, I consider them as the public acts of the president.

I must add a few words with respect to the return to this *habeas corpus*. The writ is directed to Joseph Cornman, keeper of the debtors' apartment of the prison of the city and county of Philadelphia, who made return, that he detained Mr. Lockington by virtue of a written order from

John Smith, Esq., marshal of this district, by which he was commanded to keep the said Mr. Lockington, who had violated the orders of the president, &c., until he should be discharged by law. Connected with this return, I must take the suggestion presented by the marshal, and verified by his oath; by which it appears that he placed Mr. Lockington in the debtors' apartment, until he could be conveyed or would voluntarily go, to Reading. The marshal's order to the keeper of the prison has, at first view, somewhat the air of a judicial act, for which he certainly can have no authority. But the peculiar circumstances of the United States with regard to prisons, will serve to explain the matter. They have no prisons of their own, and make use of the state prisons, by permission of the several states. Although the marshal held Mr. Lockington in custody in a ministerial capacity, it might be necessary for him to give the keeper of the prison some document to authorize his detaining him; so that I consider Mr. Lockington as, in fact, in custody of the marshal. Being of opinion that the marshal had a right to take him into custody, and place him in the debtors' apartment for safe keeping until he could conveniently be removed to Reading, I must order, that Charles Lockington be remanded to the custody of the keeper of the debtors' apartment.

The prisoner was accordingly remanded.

Subsequently, on the 1st of January, 1814, the prisoner having sued out a new writ of *habeas corpus*, returnable before the supreme court in *banc*, and the case having been elaborately argued during several days, by *Messrs. Hare* and *Condy*, for the petitioner, and by *Mr. Dallas*, for the marshal; the following opinions were delivered:

Tilghman, C. J.—Having on a very late occasion delivered my opinion on the authority of this court to issue writs of *habeas corpus*, and also on the authority of the

president of the United States, and the regulations established by him by virtue of the "Act respecting alien enemies," I have at present only to refer to that opinion, and to say, that it remains unaltered. But Mr. Lockington has brought his case before us in another point of view, on which it is necessary to decide. He has petitioned this court to order him to be removed out of the United States, or to permit him to go of his own accord. I am clear in the opinion that no part of this petition can be granted. This court has no power with respect to the removal of alien enemies, except that which is derived from the act of congress. And that act authorizes us to proceed only "upon complaint against an alien enemy, who is resident and at large within this state, to the danger of the public peace or safety, and contrary to the tenor or intent of the proclamation or regulations established by the president of the United States." But no complaint has been preferred against Mr. Lockington. He has caused himself to be brought before us by a *habeas corpus* in order to decide on the legality of his imprisonment, and although, in the return to the writ, some facts are stated which might afford ground for complaint, yet that return is by no means to be taken as the exhibition of a complaint, but merely as the setting forth of the causes for which the prisoner is held in confinement. But, even if we had jurisdiction, I should be equally clear that the petition ought not to be granted, because, the president of the United States having established certain regulations, within the sphere of his authority, by virtue of which Mr. Lockington is to be held in restraint within the United States, we have no power to contravene those regulations, by ordering him to be removed out of the United States, or by permitting him to go of his own accord.

YEATES, J.—The argument on this *habeas corpus* has been conducted with singular ability and depth of research.

[Lockington's Case.]

A preliminary question has been raised by the district attorney of the United States, that, as a state court, we have no jurisdiction of the case before us. Upon this point, I feel no doubt or difficulty whatever.

It is candidly admitted, that in all cases where a person is restrained of his personal liberty, and the court or judge have the slightest doubt of the legality thereof, they ought, upon a proper allegation made to them, to award a writ of *habeas corpus*. Here, Charles Lockington has been deprived of his liberty, and is in actual confinement in the debtors' apartment of the prison of the city and county of Philadelphia. He complains of his imprisonment, as illegal, and demands a hearing. This court and each member of it, in vacation, have authority to allow a writ of *habeas corpus*, as well at common law as under the express terms of our act of assembly of the 18th February, 1785, which directs, "that where any person not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any colour or pretence whatever," he shall have such writ. Admitting, in its fullest extent, the judicial power of the United States to extend to all cases in law or equity arising under the constitution, the laws of the United States, and the treaties made under their authority, it does not follow, that the jurisdiction of the state courts in such instances is abolished. They are necessarily called upon to determine, in many cases, the true construction of the constitution, the laws of the United States, and treaties made under their authority. But the ultimate decision in these instances is secured by law to the supreme court of the United States. It is declared, by an amendment to the constitution of the United States, that the powers not delegated thereby to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people. No act of the general government has attempted to take away the right of the state courts in the particular under consi-

deration; and it is of the utmost importance to the citizens and other inhabitants of every state of the union, that a speedy hearing should be secured to them in all cases of restraint of their personal freedom. The true interests of the individual sovereignties composing the union, and, in truth, of the union itself, are inseparably connected with the independence of the judicial tribunals of the several states. Imperious duty enjoins on the state courts, not to surrender up their right of issuing writs of *habeas corpus*, unless on the clearest conviction that they have no just claim thereto.

The return by John Smith, the marshal, to this writ is of a very special nature. It states the act of congress declaring war against Great Britain, the president's proclamation, the president's directions of the conduct to be observed by the United States towards alien enemies, and more especially that of the 23d February, 1813, setting them out, that Charles Lockington reported himself to the marshal as an alien and British subject, and applied for a passport to retire to Lancaster, which was afterwards changed to Reading, at his own request; and that after the marshal's designation of Reading, he found Lockington in Philadelphia, and directed and required him to repair to Reading, which he refused to do, and thereupon he took him into custody, and placed him for safe keeping in the debtors' apartment, until he could be conveyed, or would voluntarily go, to Reading, or should be otherwise discharged according to law; that Lockington sued out a *habeas corpus*, returnable before the chief justice, and was remanded upon a hearing, and afterwards brought an action of trespass and false imprisonment against the marshal, but refused to execute a parole of honour which was tendered to him; that Lockington had, on several occasions, since the president's proclamation, grossly abused the indulgence and hospitality of the United States, by declaring his adherence to the enemy, and his disposition

to support their interest, and by aspersing the character and conduct of the government and people of the United States; and that when Lockington was taken into custody he was resident and at large within the district of Pennsylvania, to the danger of the public peace and safety, &c.

The question before us is, whether a legal and sufficient cause for the imprisonment of Charles Lockington has been shown to the court.

The contest arises on the words of the act of congress, passed the 6th of July, 1798, "respecting alien enemies." The first section thereof provides, that "in the event of a war or invasion, and the president of the United States shall have made public proclamation thereof, all natives, citizens, denizens or subjects to the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies. And the president of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security, their residence shall be permitted; and to provide for the removal of those who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises, and for the public safety, &c."

Here it is objected, that although war has been declared against Great Britain, and the same has been proclaimed by the president of the United States, yet he has neither by his proclamation or other public act, given the directions, or established the regulations required by the law; and that such directions and regulations being in the nature

of public laws respecting the conduct of alien enemies in general, ought to have been solemnly authenticated under the national great seal. That the notification made on this occasion produced the effect designed thereby, is ascertained by the fact, that the British alien enemies resident among us actually reported themselves to the marshal. If the act has been done in the usual and accustomed manner in which the communications of the president of the United States have been made in other cases wherein such duty has been enjoined on him, it would appear to me to be a sufficient public act within the meaning of the law. These public acts issued from the department of state, founded on the president's instructions, and were made known through the medium of the same newspapers in which the laws of the union were promulgated. We find the president was authorized to establish regulations under the embargo laws of 1794 and 1807: and the communication thereof was made by the secretary of the treasury. So, also, where the president was empowered to borrow money on loan. In like manner, where the authority was given to him to extinguish the lights on the sea coast: and so in other instances, which were cited on the argument. To civil commissions, the great seal is necessary by the law of the 15th December, 1789; but it is not to be affixed to other papers unless directed by the president of the United States. Proclamations are not always under the great seal. Added to the different letters from the secretary of the department of state, under his own signature, to the marshal, containing his official instructions, several letters have been produced from John Mason, Esq., commissary-general of prisoners, including the superintendency of alien enemies, a known officer in the execution of his duty, which refer to the publications of the department of state, as founded upon the immediate act of the president of the United States. On this point, therefore, I am of opinion, that the president, by a public act, has given the

directions, and established the regulations enjoined on him by the law of the 6th of July, 1798.

But the great difficulty of the case remains still to be considered. Was the imprisonment of Charles Lockington, by the mere act of the marshal alone, under his instructions, legal, without calling in the aid of the judicial authority? It is a question of great moment, inasmuch as it deeply interests the national welfare, and all that class of alien enemies which falls within the president's regulations, and therefore demands the fullest investigation.

I will assert at once, that I consider Charles Lockington, although an alien enemy when the war was declared, yet, as resident among us at that period, entitled to certain rights, until he has forfeited them by some offence cognizable by the laws of war. I do not view him as a prisoner of war, subdued and forcibly brought into the United States. And it is observable that under the letter of the 15th April, 1813, from the secretary of state to the marshal, that the superintendency of alien enemies is annexed to Mr. Mason's character as commissary general of prisoners, so that they are distinct offices, though united in one person.

I regard the true meaning of the law of the 6th of July, 1798, to be collected *ex viscribus suis*, as the only correct ground of decision thereon. It is of no moment, in my idea, how it was treated by different gentlemen on the floor of congress, or to what political party they belonged. It has passed into a law in the form in which we find it in the statute book. As such, we are compelled by every tie of duty to execute it, even although we should suppose it to infringe, in some instances, the ancient or modern codes of the law of nations.

The great, prominent feature which is exhibited to our view in every part of this law, is, that its provisions were made for the public safety; and although "the dictates of humanity and national hospitality" were not unattended to, their extent was limited to the *salus populi*.

The first section I have already recited. The president of the United States was thereby empowered to establish *any* regulations which should be found necessary for the public safety. Persons of a certain description were liable to be apprehended, restrained, secured and removed, as alien enemies, under the president's directions. Their residence therefore might be restrained to certain distances from the tide water, according to the president's idea of probable impending danger to the community at large. The means of effectuating the primary object of *ne quid detrimenti capiat respublica*, must necessarily be supposed to be given; and if the alien refused or neglected to repair to the place of residence appointed by the marshal, under the president's directions, the marshal might secure and remove him. The terms of this section taken by themselves and independently of the succeeding section, would warrant a confinement by the marshal, for the purposes of removal.

The words of the second section are contended to have restrained the general import of the preceding clause. It is thus expressed: "After any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively authorized, upon complaint against any alien or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the president of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and, after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of

their good behaviour, or to be otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed."

It is urged, that a marked line has prescribed the manner in which the regulations of the president should be effectuated, and that the powers granted to the courts, judges and justices are fully competent to carry the president's directions into complete execution. It is asked, shall the marshal execute instructions in the nature of a general warrant, without revision or control? And what ground of jealousy can be entertained against courts and judges who openly administer the justice of the country according to known rules? The dangers to be apprehended from the conduct of ministerial officers in executing such general directions have been depicted in vivid and glowing colours.

When the vessel of the commonwealth is in danger, partial evils must be submitted to, in order to guard against a general wreck. Aliens who have come among us before a declaration of war against their sovereign, and continue to reside among us after it, cannot expect an exemption from such evils. Should our country be invaded, or our coasts blockaded, common prudence suggests that such persons should be removed from the scene of action. They may be safely detained, without subjecting them to unreasonable hardships, until it can be ascertained what course of conduct will be observed by the hostile country towards our own citizens resident there. The "law's delay" would ill suit such removals in cases of sudden emergency. To suppose that alien enemies might be wantonly sent to the head waters of the Missouri or an uncultivated wilderness, by the president of the United States, or by the marshals of the federal courts, is to put extreme cases, which no reasonable man will presume. But the president and every

executive officer of the union are responsible for the abuse of their authority; and, I may confidently assert, from my experience in life, that, in this government at least, where a public officer has been guilty of oppression in office, he never has escaped with impunity, when an appeal has been made to the justice of the country.

The reason of introducing the second section into this law, appears to me to be by way of aid to the general measures of the government, and that the judicial authority is made auxiliary to the executive. It extends only to alien enemies who shall be resident and at large, to the danger of the public peace and safety, and contrary to the tenor of the president's regulations. Such persons may be apprehended by the orders of the several courts of the United States, and of each state having criminal jurisdiction, and be dealt with conformably to such regulations. The aid of the judicial authority will always be found of great moment to the marshal in the execution of his official duties. It conduces to the public security, that such suspected person may be convened before a state court, as well as the several courts, judges and justices of the United States, to answer the complaint made against him by the marshal, his deputies, or any individual. It would be deemed oppressive in the highest degree, if the party accused was to be brought before the district judge of the United States, in this city, to answer a complaint made against him in the extreme parts of the state. The witnesses in support of the prosecution would also be thereby subjected to great difficulties.

I therefore consider the true construction of the act in question to be, that the marshal may legally enforce the directions of the president, communicated by the proper departments, without being under the necessity of recurring to the judicial authority for that purpose. By section third, he may remove an alien out of the territory of the United States under the warrant of the president; and under his

regulations he may be removed to a place in the interior, where less danger may be apprehended from him. It is not left to us to decide on the expedience of such a power being vested in the marshal, or avert the dangers which may result therefrom to the personal liberty of individuals. The law is bottomed on the great principles of self-defence and self-preservation; and if mischiefs arise therefrom, the legislature of the union is alone competent to apply a remedy.

The question before us is not whether, if Mr. Lockington had, in the first instance, elected to leave the territory of the United States, he would not have been entitled thereto, unless he had been charged with actual hostility, or other crime against the public safety, or some strong and cogent reason could be shown to the contrary; it is, whether, after having reported himself as an alien enemy under the regulations of the president, and his place of residence changed at his own request from Lancaster to Reading, he is not liable to be confined until his removal to the place of designation can be effected? I am of opinion that the imprisonment of his person by the marshal on the ground of his refusal to go to Reading, was justifiable under the act of congress, and that we cannot relieve him from his confinement. His want of pecuniary means to remove himself to Reading, may excite our sympathy, but cannot change our decision.

I concur that he be remanded to the debtors' apartment.

Brackenridge, J.—I will acknowledge that it is not an easy matter, to say what construction shall be put upon this act of congress, entitled, "An act respecting alien enemies:" whether the executive of the general government shall be confined to the ascertaining and declaring such reasonable time for the departure of this description of persons from the United States, "as may be consistent" with the public safety; and according to "the dictates of

humanity and national hospitality," no treaty having existed stipulating for a certain period: and whether, after having ascertained and declared such reasonable time, the executive of the general government was authorized merely "to direct the conduct to be observed on the part of the United States," towards this description of persons, who should remain in the country after such time; and that it shall lie with the judicial power to apply such directions to the particular case.

It cannot but have some weight, in a dubious case, to see what has been the construction put upon this act by the executive of the general government who has been intrusted, at least to some extent, with the carrying this act into effect. The construction the executive of the general government has put upon it is discoverable from the manner in which it has acted upon it, and the measures adopted in carrying it into effect. But considerations of policy, in the construction of an act, must at all times have weight.

Will it be contended that the judicial power is the only medium through which an alien enemy can be apprehended, &c., and this on complaint made? In that case, it being left to the interference of individuals, little would be done. It is odious to inform, and unless imposed as official duty, who would like to do it? It would be too much to expect from the mere impulse of patriotism such exertions for the public safety. Would it not seem too narrow a construction of the act of congress, and tending to defeat the object of the law? If so, I would consider the judicial power as auxiliary only to the authority of the executive of the general government, and no more. The auxiliary aid of the judicial power is consistent with the executive power of the general government in apprehending, &c. But the authority of the judicial power to judge of what the executives of the general government have done in the exercise of their authority according to the law of nations, or under the act of congress, is inconsistent with the right of the

executive to judge in the last resort, or to act in the first instance. Every court of every state competent to issue a *habeas corpus*, may impede the acts of the executive of the general government, in the exercise of its power.

"Quo capitum totidem stadiorum millia."

A thousand inner wheels will counteract the outer, and the machine will stop. The interior gyrations will not correspond with the exterior in a geometrical problem; or, as we say, in mathematical science, the interior circles will not be parallel with the exterior. No machine can be constructed that would move on such a principle. For the supreme court of the United States can have no control over the concurrent acts of the several courts by way of appeal, in this case. May it not therefore be inferred that it could not have been intended under the act of congress to give the judicial power, either of the courts of the United States or of the state courts, more than an auxiliary jurisdiction?

Hence, the question in this case will be, can the judicial power do more than what is auxiliary, and interfere on behalf of an alien enemy, to take him out of the custody of the executive of the general government, on the ground of being "apprehended, restrained, secured, or removed," unreasonably and without just cause, or oppressively in the particular case? I consider alien enemies, so apprehended, &c., as coming under the denomination of prisoners of state, not for any offence against the state, but for reasons of state; it being necessary for the safety of the state that they should be so apprehended, &c. Having not been taken in battle, I cannot call them prisoners of war, for they are not liable to be exchanged. But what else can they be considered, when apprehended, but as prisoners to some extent? By this act, entitled, "An act respecting alien enemies," the president would seem to be constituted as to this description of persons, with the power of a Roman dictator or consul, in extraordinary cases, when

the republic was in danger, that it sustain no damage: *ne quid detrimenti respublica capiat.* Are we not excluded, in such case, by our *habeas corpus* act, which is the same with that of the constitution of the United States, art. 4, § 2. "A person charged with a breach or violation of the law of nations," is not the subject of a *habeas corpus.* Alien enemies remaining in our country after a declaration of war, are to be treated according to the law of nations, and it has been so argued in this case. Shall then the judicial power constitute itself a judge between the executive of the general government and the nation with whom we are at war, and say, whether the proceeding in the case of their subjects remaining in our country has been according to the law of nations?

There is the same reason that the municipal judiciary shall not interfere with the general executive, as where the individual is charged with a breach or violation of the law of nations. In a case of alien enemy, I do not therefore see how this state court or the court of the United States, can undertake to say whether the proceeding of the executive of the general government has been regular or irregular, according to the law of nations in the case, or according to the act of congress; of which, it must be supposed, they are the judges, and responsible only to the body politic of the union for the construction of their statute.

A report has been read from a gazette, of a decision of a court of the United States, Chief Justice Marshall and Judge Tucker composing that court,—great names, and in high station. This report, if correct, carries with it evidence that the executive authority was warranted in apprehending, &c., without the intervention of the judicial power. It carries with it evidence also that this court did undertake to review and set aside the acts of the marshal, at least, under a *habeas corpus*, on behalf of one apprehended and restrained by him. This was on the ground of not appointing a place to which the prisoner was to be re-

moved. The exercise of this power would seem to imply, that it was competent to them to judge also of the *locus in quem*, or the place to which the alien enemy was to be removed. It might be an unwholesome fen, or dismal swamp, a barren mountain, an unpeopled country, a remote district, a Siberian wilderness. Might not such consideration be extended also upon the same principle to the nature of the society to which the alien was to be removed, or the *locus in quo* as unsuitable for the employment of the alien in his accustomed occupation or art, so as to be able to obtain the means of subsistence, or otherwise? If such latitude could be taken by the courts, what hindered to have reviewed the whole proceedings of the general government, *ab initio*, and to have begun at the bottom, or first act, in relation to alien enemies? To have inquired as to the executive having given notice and a reasonable time to alien enemies to depart from the country before it had proceeded to apprehend, &c.?

It is true, it is not enjoined that the president *shall* give notice by proclamation or other public act, the word *may* being used; but was it not a *sine qua non*, an act without having done which a step could not be taken in apprehending, &c.? This would seem to be a reasonable construction, and that it was not until after such proclamation, or other public act announcing this, such description of persons remaining in the country after such limitation of time, were bound to consider themselves as liable to be apprehended, &c. Were I to take any ground in the case, it would be this; for I do not see any declaration or public act of the government announcing such time, after which alien enemies choosing to remain were to consider themselves as existing—that is, remaining—in the country by the courtesy of the government, and subject to all the regulations, restrictions and directions which might be made by the government respecting them. But I do not see that the courts of the United States have the power to interfere

on any ground, on behalf of such description of persons. The courts of the United States have no more power than this court has to inquire into the regularity of the proceedings on the part of the executive of the general government, with regard to this description of persons. The return of the marshal that he holds an applicant as an alien enemy, in other words, a British subject, for that is the only nation with whom we are at war; and the admission by the applicant that he is of such description of persons; no traverse tendered as to his not being such, exclude, in my opinion, the interposition of this court, or of any other court. This redress against any undue proceeding of the executive, or of any officer acting under the appearance of that authority, must be through the department of state to the president himself.

I have no idea that if the alien enemy had violated a municipal law, and had been arrested for that offence, and was in custody under process from any municipal court, the president could interpose to take him out of custody, or to send him out of the country. For the alien enemy is not out of the law so far as to claim protection from the law against trespasses; or so far as not to be liable to prosecutions for trespasses done by him; but so far as to preclude interposition between him and the general government. I think he is to be considered as out of the municipal law, and not the subject of a *habeas corpus* in that case. We are *imperium in imperio*, and I do not think our judicial power extends to impede the march of the general government, but is confined to what is auxiliary, and cannot control. It will be understood that I mean the case of a person in custody under the denomination of a British subject; and who admits himself to be of that description of persons, and to be in confinement as such. I do not see that any *habeas corpus* can issue, unless the applicant can make an affidavit in the first instance that he is not an alien enemy, or, in other words, a British subject,

flagrante bello with that nation. It wholly belongs to the general government; and, on a representation to the executive, through the department of state, it cannot but be presumed by the judicial power, that in the case of any undue proceeding against an alien enemy, relief will be given. It would introduce endless confusion and embarrassment to say that the judicial power can at all times interfere between the alien enemy and the general government, so as to take him out of their hands, on an allegation that he was treated with inhumanity or hardship. The only thing that is alleged, or can be alleged is, the not having given notice, a reasonable time, to depart. I do not see that this step has been taken in the first instance; if it had, there could not a word more be said. This, however, will be a consideration with the executive, who is responsible to the nation for every thing that an alien could claim.

As to the taking up of this case on the score of a complaint made to the judicial power, so as to make any order, the alien enemy is not at large, which is the term in the act of congress; and it is only in such case that the judicial power is warranted in apprehending, &c., so as to make an order to remove. We have not the power, not even if the marshal was to half strangle, instead of half starve, the prisoner: for the marshal is the president, and what he does must be considered the act of the executive. At the same time, I must remark, that we have no evidence of half starving, or of any other hard usage, but the contrary. It is on a complaint against him that the court can interfere; not on a complaint for him. The marshal makes no complaint against him. He stands upon his bond, and says he has him in custody. Can we take him out? I think we cannot.

To sum up what has been said in a desultory manner, the first step which, it seems to me, it behooved the executive of the general government to have taken under the act of congress in question, was the promulgation of the

reasonable time for the departure of alien enemies, six months having been given by the act of congress of the 6th July, 1812, "within which passports for the safe transportation of any ship, or other property, belonging to British subjects, then within the limits of the United States," this might have been supposed to have been the limitation for the departure of persons also. But a distinction exists, and was to be taken between property in persons. There ought, in strictness, to have been a proclamation, or some public act, limiting the time as to these, after which they should consider themselves as liable to be apprehended, &c.; and this not appearing to have been done, doubtless on a representation to the president now, through the department of state, by any of those willing to remove, they will obtain permission to depart, so that there can be no necessity for the courts to interpose, if they had the power: but it is my opinion they have not. It is on complaint made, that the courts are warranted to act; meaning, I take it, the same with information given, that any alien enemy, contrary to the tenor and intent of such proclamation, or other regulations which the president of the United States shall and may establish in the premises, that the courts shall cause such alien or aliens to be duly apprehended and convened before such court, &c. But in order to be effectual for the great mass of his operations for the exigencies of the public safety, the executive must be considered as having a right to act in the first instance. It is on proof of improper and suspicious conduct, that the alien is to be informed upon, or complained against, to a court or judge, and, sufficient cause appearing, that measures may be taken by this functionary of administration. But the president is not confined to examination in the individual case, and sufficient cause appearing, in prevention of what may be done by aliens, the president may order off or cause to be removed out of the country, or confined within it, and this simply on the ground of not having de-

parted agreeably to proclamation, or removed agreeably to regulations. I state this, the necessity of giving the act this construction, as justifying the president, by his marshals, acting independently of judicial functionaries, and not subordinate to them. And for this reason, I am confident in my opinion, that the privilege of the *habeas corpus* does not extend to an interference with the proceedings of the executive authority in such case. Did I not think so, I would consider myself bound to liberate on the ground of the first step not having been taken, the giving notice; where the *requisitus* is not shown, and this not matter of form, but matter of substance in any case, a judicial proceeding cannot be supported, but the plaintiff must be nonsuit. But it may be said, that the calling on alien enemies to report themselves to the marshal was notice. But this was forthwith, and does not imply a time preceding. But this is a matter the responsibility of which lies to the nation, and with foreign nations, and not with the judicial power under this act. At the same time, I must say, that I cannot suppose any of those remaining in the country would have removed, had notice of reasonable time been given. The president had taken it for granted that all had removed within the six months, with their effects, that chose to go, and it is matter of form only, that is complained of in this case. But of that I do not deem it competent for a judge or court to determine. It must lie with the executive, and not the judicial power.

The prisoner was accordingly remanded.

Commonwealth *v.* Young.

[SEPTEMBER, 1818.]

The constitution of the United States prescribes the only mode by which they can acquire land as a sovereign power, and therefore they hold only as an individual when they obtain it in any other manner.

Under the act of congress of 2d August, 1813, authorizing the president of the United States to sell certain lands in Pennsylvania, which had been assigned to them by the late proprietary, but of which the jurisdiction never had been ceded by the state, a sale was effected by A. B. by public outcry. This was held to be a violation of the law of Pennsylvania of the 28th March, 1814, for the regulation of auctions, by which all sales of this description are to be made by persons commissioned by the governor of Pennsylvania.

ERROR to the Mayor's Court of the city of Pittsburgh. By the record returned, it appeared the question arose upon a special verdict. The cause was argued by *Wilkins*, for the commonwealth, and *Baldwin*, who appeared on behalf of the United States, under whose authority the defendant had acted.

TILGHMAN, C. J., was not present at the argument, and gave no opinion.

GIBSON, J.—The defendant was indicted in the mayor's court of this city, for selling a lot of ground by public outcry, to one Daniel Spears, in violation of the laws regulating auctions. It appears by the special verdict, that the title to the ground in question, and on which the government had erected Fort Fayette, was, by the late proprietary, vested in fee simple, in the United States, and that the fort, which had been used as barracks, a military depot, and place of defence, had been disused as such, a short time previous to the sale; but that Pennsylvania had never ceded her right of jurisdiction over this ground to the federal government. On the 2d of August, 1813, congress

authorized the president to sell it, without prescribing the mode; and the defendant was employed by the president to make sale of it by public outcry. Previous to the sale, he received notice from Dennis S. Scully, the city auctioneer, of the exclusive right of the latter to dispose of real property at auction within the city of Pittsburgh; notwithstanding which, he effected the sale. On these facts judgment was rendered for the defendant, by consent, for the purpose of bringing the question before this court; and it is now argued that the United States, being a sovereign power, did not, and could not, hold this ground subject to the municipal regulations of the state.

The decision must rest, I apprehend, on a few elementary principles that are very plain. Before the establishment of a federal government every state possessed full, complete, and absolute sovereign power. By the federal constitution a portion of that sovereignty was, for national purposes, transferred to the general government: the residue remained to the states. The sovereignty of the United States is derivative; that of the individual states inherent: but the authority of both is limited, being restricted to the exercise of powers applicable only to particular subjects; neither being sovereign to every purpose, and in every aspect, but only so, when acting within the prescribed limits of its authority. For all national purposes the United States is completely sovereign: for all domestic purposes, unless where there are express or strongly implied exceptions, each state is so. The jurisdiction of both, in the particular aspect in which each possesses the attributes of sovereignty, may, for national and state purposes, be exercised on the same subject and at the same time. In other cases the jurisdiction is exclusive. In the eighth section of the first article of the federal constitution, there is an accurate enumeration and definition of the objects to which the powers of the federal government extend, except the authority to pass laws to carry the preceding powers into execution,

which is necessarily indefinable. What is the extent of the federal sovereignty, as to soil and territorial jurisdiction? By the eighth clause of the section just mentioned, "Congress shall have power to exercise exclusive jurisdiction over such district not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." There can be no doubt that under a purchase ratified by the legislature, pursuant to this clause, congress may, if they please, extinguish all state authority, legislative, executive and judicial; and exercise, within the limits of the district acquired, not only national, but municipal authority, as fully as a state can, within its own peculiar limits: for here the residue of complete sovereignty, after the grant to the federal government was carved out of it, is again united to the portion first transferred by the federal constitution, and is possessed by the United States, just as it at first was, by the state from which it emanated; with this difference, however, that when exercised for national purposes, it is general, and co-extensive in its obligation with the limits of the United States, and when exercised for municipal purposes it is local and co-extensive only with the district itself. But the lot was, in fact, not purchased in pursuance of the constitutional provision, having been obtained from the late proprietary; whether before or after his proprietary rights were assumed by the state is immaterial, as he held this lot as an individual in his private capacity, and it is besides expressly found that the state never parted with her jurisdiction over it. The United States, therefore, had no right of municipal legislation, as respected it. What power, then, can they exercise over property in the soil in a national view? I know none but that of tax-

ation. For that purpose congress has plenary authority, and may pass any law necessary to attain the end. In this respect alone, they have sovereign power over the right of soil, and in no other (except perhaps by an exercise of the doubtful right of making roads and canals) can they constitutionally effect it. Here they owned the fee simple of the ground; but that is not an attribute inseparable from sovereignty; for the ownership of the soil, and jurisdiction over it, may, and, in fact, usually do exist separately from each other. The one is always derived from the other; but each may be, and usually is the subject of a separate grant. Hence the necessity of ratification by the legislature of the state, to vest full sovereignty in the United States, where the purchase is with a view to exclude jurisdiction. The vendor passes the right of soil, and the state the right of municipal jurisdiction, which, added to national jurisdiction acquired by the constitution, invests the United States with full and absolute sovereignty over the ceded territory. Now had the United States any further power over this lot, than to dispose of it as an individual? As their sovereignty is derivative, they can hold land as a sovereign, only when it has been acquired pursuant to the provisions of the constitution. For special objects confided to the general government, a limited right of sovereignty over the soil, without a right to the soil itself, was imparted by the constitution; but this was so only in relation to those subjects on which congress had power to act. Then a right to the soil, and jurisdiction over it, being distinct matters, it follows that where one sovereign has the fee simple of land within the territory of another, the former holds in subordination to all the municipal regulations of the latter. There is no abasement in this; for in the days of feudal tenure, when the difference of rank between the lord and the vassal was marked by circumstances far from flattering to human pride, it was not uncommon for a sovereign, the tenant of a fief, to do homage for it to another,

even of inferior dignity. It is clear, then, that the United States, though sovereign for some purposes, did not, in relation to this lot, stand in the situation of a sovereign, but an individual; and if so, the *lex loci rei sitæ* must govern. In transferring property held as an individual, government must conform to the municipal laws of the place. *United States* v. *Crosby*, 7 Cranch 116. The lot was subject to taxation for state purposes, to the laws directing the mode of alienation, and, in short, every other state regulation that could operate on the property of an individual. For all these purposes the state was sovereign. On the other hand, congress, in the use of its legitimate powers, have a right to tax land, the property of a state, when it is not, at the same time, held in sovereignty, without any violation of state rights: for in the exercise of this power, both by the United States for national, and a single state for municipal purposes, each, respectively, is sovereign and each subordinate. If the act of congress had, as to the mode of sale, pretended to vest in the president a power paramount to state authority, it would have been unconstitutional and void. Such an assumption of power could be founded only on the doctrine of federal supremacy in all cases, whether national or municipal; and would, if tolerated, be the signal for destroying the power of the courts to pass on the constitutionality of any law, and, particularly, for abolishing the subjection of state legislation to the decisions of the federal judiciary: a result deeply to be deplored by every friend to civil liberty.

I shall now notice a few of the arguments urged in behalf of the defendant. It is asked, if the state can tax the property of the United States, why not an office under the federal government? Simply because a power of this sort would be inconsistent with the safety and very existence of the general government; and therefore a restriction of its exercise must necessarily be implied from the nature of the power itself. The case of a loan at a higher rate of

interest than is established by the state laws, is provided for in the constitution; for congress, having power to borrow money, must necessarily have the ancillary power of fixing the terms; without which a power to borrow would be nugatory. So, a power to establish courts of justice, necessarily includes all powers requisite to carry the judgments of such courts into effect; and for this reason a sale by the marshal, under process of a federal court, would not, though made by public outcry, be a violation of the auction laws. But in all these cases, power is, by necessary and irresistible implication, given in the constitution. The exemption of the United States from payment of costs, is put as an analogous case; but this is confined to her own courts, and the reason of it is plain. Costs are not recoverable at common law, and there is no act of congress which imposes them on the federal government; but in a state court this exemption would not be allowed, even if there were an act of congress for it. Lastly, it is asked whether a sale under the authority of the state, herself, would contravene the auction laws? Certainly not; for being, for this purpose, perfectly sovereign, the dispensing power would rest with her; and as to the United States not being bound because not particularly named in the state laws, that depends on their claim to be treated as a sovereign, and must stand or fall with it. If the president, representing the United States, cannot dispense with a state law, his agent by him cannot shield himself under his authority. The judgment of the mayor's court ought therefore to be reversed, and judgment entered for the commonwealth.

Duncan, J.—This is a prosecution for the penalty under the act of 28th March, 1814, authorizing the appointment of an auctioneer for the borough of Pittsburgh, which enacts, that the said auctioneer shall have power, within the borough of Pittsburgh, to set up and expose to sale by

public auction and vendue, all and every houses and lots, land and goods, &c., and property of what nature and amount soever; and if any other persons than the said auctioneer or his deputy, shall be found selling or disposing of any property whatsoever, other than the said auctioneer or his deputy, by way of public vendue within the said borough, except sales made by executors or administrators, or sales on judicial process or by distress, such person so offending, and being thereof legally convicted before the court of quarter sessions, shall, for every such offence, forfeit the sum of one hundred dollars for the use of the poor of the borough.

The special verdict finds all the facts necessary to bring the defendant within the provisions of this act, unless the property sold stood in that situation, as that it was privileged and exempted from the operation of the act. The privilege of exemption is claimed on the ground that it was the property of the United States, sold under an act of congress: that the United States derived their title under the late proprietors of Pennsylvania: that the United States had erected a fort thereon, which had been used as a barrack, a military depot, and place of defence, but which had been disused as such for some short time before the sale. The special verdict further states, that the state never had ceded the jurisdiction to the United States.

It was contended, on the part of the defendant in error, that under the constitution of the United States, congress had the power to dispose of, and make all needful rules and regulations respecting the territory, or other property, belonging to the United States; and that if the state of Pennsylvania possessed the exclusive power of legislation, this act does not include the property of the United States, inasmuch as they are not expressly named.

The jurisdiction over this spot (being within the limits of Pennsylvania) must remain in the state, unless divested of it by the constitution of the United States, or some law of

her own. There cannot be concurrent legislation. It must exclusively belong to the one or the other. Such is the nature of real estate, that the *lex loci rei sitæ* must prevail universally. The eighth section of the eleventh article of the constitution of the United States, defines the legislative power of congress. The seventeenth provision enables congress to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. This enumeration excludes an authority in all but the places enumerated. The legislation and authority of congress is confined to cessions by particular states for the seat of government, and purchases made by consent of the legislature of the state, for the purpose of erecting forts. The legislative power and exclusive jurisdiction remained in the several states, of all territory within their limits, not ceded to, or purchased by, congress, with the assent of the state legislature, to prevent the collision of legislation and authority between the United States and the several states. The cases of the jurisdiction of the United States as to territory, are clearly defined by the constitution of the United States. No misunderstanding can ever arise, because the cession must be made by the state to the United States, or the purchase made by the United States, with the consent of the state legislature. There is a legislative exposition by congress as early as 2d April, 1794. This first exercise of the power of congress under the constitution, proceeded from men of whom many were the framers of the constitution.

By that act it is provided that for the safe keeping of the military stores, there shall be established under the direction

of the president of the United States, three or four arsenals with magazines as he shall judge most expedient, in such places as will best accommodate the different parts of the United States, either or both of the arsenals heretofore used at Springfield and Carlisle, to be continued as part of the said number, at his discretion: provided, that none of the said arsenals be erected, until purchases of land necessary for their accommodation be made with the consent of the legislature of the state in which the same is intended to be erected.

This power is not delegated to the United States by the constitution, nor is it prohibited to the United States; and by the twelfth article of the amendment of the constitution, it is reserved to the United States respectively. If the lands held by the United States are not subject to the laws of the state, in whose limits they are, no crime committed in them could be the subject of state jurisdiction. Nor could it be of United States jurisdiction, unless in the two defined cases under the constitution. It would be a portion of territory out of the reach of any human tribunal; a sanctuary beyond the control of any human law. There is only one decision on this subject, *Commonwealth* v. *Ethan A. Clary*, 8 Mass. 72. It was an indictment for selling spirituous liquors within the town of Springfield, without license, against the form of a statute of that state; and it was there decided, that the courts of the commonwealth could not take cognizance of an offence committed on lands in the town of Springfield, which had been purchased by the United States, for the purpose of erecting an arsenal, &c., to which the consent of the commonwealth had been granted by statute. When the United States have determined to bring the territory under their own authority, they have followed the provision of the constitution, by obtaining the legislative assent of the state to the purchase, as in the case at Springfield. The objection occurred to the court, that if the laws of the commonwealth had no

force within the acquisition of congress, the inhabitants thereof could not exercise any civil or political privileges, under the laws of Massachusetts, in the town of Springfield. The consequence was admitted; but the court consider this no hardship, because the inhabitants are not interested in any election made within the state, or held to pay taxes imposed by its authority, nor bound by its laws.

The construction that congress, without the assent of the legislature, may purchase land within the limits of any state, and place a colony there, exempt from state jurisdiction, taxation and legislation, would indeed strike us with alarm. The most dreadful mischief would arise from this border jurisdiction: these little anomalies, dotted over the extent of a great state, having the inhabitants of those places, unrepresented either in state or general governments, exempt from taxation, and free from the operation of all law, and not punishable by the courts of another. The mode of acquiring and disposing of territory, whether by an individual or by the United States, must be regulated by the laws of the state in whose chartered limits it is. Is it or can it be law, that if the United States purchase land within this state, which by her laws declares all conveyances, not registered within six months, void as to subsequent purchasers; that the subsequent *bonâ fide* purchaser, without notice of such unregistered conveyance, should not be protected by the registry act? Suppose the agent of the United States had disposed of this property by lottery; would not the state law against lotteries attach to this? Could any of the garrison of fort Fayette sell liquor to any of the citizens, without incurring the penalty of the law? Suppose rape or murder committed within the precincts; have the state courts no jurisdiction? The United States courts clearly have not authority. Nor does the authority given by the fourth article, section third, of the constitution of the United States, (granting power to congress to dispose of and make rules respecting this or other property belong-

ing to the United States,) vest legislative power over a territory within the limits of a state. The territory of the United States then signifies that portion of land beyond the chartered boundaries of any state, or cessions of chartered boundaries that had been ceded by the respective states. These are denominated, by the acts of congress, territories. There is over them a territorial government. The fourth article gives full faith and credit to the public acts and records of any state, in all the states; and grants to congress the power of prescribing the manner of authentication and the effect; declares that citizens of each state shall be entitled to the privileges of citizens of every state; provides for the delivering up of fugitives; the organization of new states, and the disposition and regulation of the territories belonging to congress, and guaranties a republican form of government. To stretch the constitution beyond this, and because congress have a power to regulate and dispose of the territory and other property, that they may make laws for the disposition of it in a manner prohibited by the laws of the state in which it is situated, except in the two cases provided, would be a most mischievous construction, inconsistent with the general plan and special provision of the whole system, and introductive of the most destructive confusion, discord and anarchy. The argument of lands sold at auction for direct taxes has no application; for congress has express power, by the constitution, to levy and collect taxes. Possessing the power to levy and collect, the paramount means remains with them. It is incidental. But congress have authority to make all laws necessary to carry into execution any power vested in them by the constitution. But the counsel on the part of the defendant in error has insisted, that the act does not embrace the land of the United States, as the United States are not named expressly. This claim must have its foundation on the royal prerogative. And the argument is, that as the king of England is not bound by acts of parliament, unless

named, therefore that the United States, in the character of land holders, are not bound. The reason on which this rule is founded never could be applicable to this government. The general rule laid down is, that the king's rights shall not be barred or restrained by any statute, unless he be specially named; for, if he were specially named, this might be a reason for his withholding his assent. But even the king, though not named, may be precluded of such inferior claims as might belong, indifferently, to him or a subject, as the title to an advowson or landed estate; but not stripped of his ancient prerogative, nor of those rights which are incommunicable, and appropriated to him as appurtenant to his regal capacity. When it does not destroy the ancient prerogative, nor deprive the crown of any prior right, but only new-models it, such laws bind the king, though not named. *The King* v. *The Archbishop of Armagh*, 1 Strange 516, and 1 Woodes. 31. The king, as a landholder, would be bound in all statutes regulating the disposition of land. To these prerogative claims on the part of the United States, as sovereign rights, I cannot subscribe. The sovereign here is the state. The sovereignty was in the state before the adoption of the constitution. It is not ceded to the United States. It is consequently reserved unimpaired by the states. The United States holding lands within the state territory (unless in the cases specified by the constitution) hold them by the same tenure that individuals do. In the *United States* v. *Fisher*, 2 Cranch 358, the doctrine of the United States prerogative is slightly glanced at, and seems to have been abandoned in an inquiry respecting the priority claimed by the United States; and the right alone claimed on statutory provisions.

Paterson, J., puts these questions to one of the counsel, in a way expressive of his opinion. "Do you consider the doctrine of prerogative as extended to this country? Are the United States not bound by a law unless named in it?"

The counsel replied, "It has been so contended by some persons in this country." I believe it has been so decided in Pennsylvania under the insolvent act of the United States. Judge Peters made some report to congress, who passed a law specially respecting the debtors of the United States. Whatever opinion some may entertain with respect to the United States not being bound by act of congress, unless named in it, I own I cannot discover the reason of such opinion in our government. Where the state possesses the sovereign power undiminished by the constitution of the United States, and where her acts may bind the lands of the United States, within her territory, I am of opinion the United States and their rights are bound by her laws, though not expressly named, in the same manner as the lands of individuals are. The case of statutes of limitation proceed on the maxim that *nullum tempus occurrit regi;* on the ground that the king is so occupied in the arduous affairs of the government that he cannot attend to his own concerns; and therefore laches shall not be imputed to him, unless he is expressly named in the statute, and then he is bound by his own assent to the law. I am therefore of opinion that the judgment be reversed, and that judgment be entered for the penalty, &c.

As this question, though not important in point of value, involves the rights of the state, and of the United States, I am glad to find the opinion I have formed confirmed by the authors of the Federalist, a work always resorted to, and considered as of the highest authority in all constitutional questions. The third number of the Federalist, attributed to the late president of the United States, Mr. Madison, after treating of the cession for the seat of government, for forts, &c., shows the propriety of congress having exclusive jurisdiction; and then proceeds to justify the same provision as to forts, &c., as no less evidently necessary. The public money expended on such places, and the public property deposited in them requires that

they should be exempt from the authority of the particular states. Nor would it be proper for the places on which the entire security of the union may depend, to be, in any degree, dependent on a particular member of it. All objections and scruples are here obviated by requiring the concurrence of the states concerned in any such establishment.

Whereupon the judgment was reversed, and the court sentenced the defendant to pay a fine of one hundred dollars, for the use of the poor of the city of Pittsburgh, and the costs of prosecution.

Commonwealth *v.* Foering et al.

[November, 1822.]

A conspiracy between A. and the book-keeper of a bank, by which A. was to draw checks on the bank, and the book-keeper was to arrange the entries in the bank so as to make it appear that A. was a creditor of the bank to the amount of the checks, is indictable at common law.

An indictment is sufficient which simply avers that the defendants did conspire together to cheat and defraud a certain bank of its moneys, &c., and then proceeds specially to set forth the overt acts.

This was a motion in arrest of judgment, the defendant having been convicted on April 30th, 1820.

The indictment in the first count averred that the defendants, "falsely, unlawfully and wickedly did conspire, combine, confederate and agree together to defraud the bank of the Northern Liberties of its moneys, &c., and that in pursuance of, and according to the said conspiracy, combination, confederacy and agreement between them, the said defendants as aforesaid did wickedly devise and agree together that the said Frederick Foering would and should from time to time draw certain checks upon the said

bank, without having any funds or moneys therein, and that the said Benjamin Williams then and there being the book-keeper of the said bank, and having as such the care and custody of the ledger of the said bank, would falsely and deceitfully so arrange the entries in the said ledger, as to cause it to appear that the said Frederick Foering was a creditor of the said bank, and had a balance of moneys therein, and the said Frederick Foering in pursuance of, and according to the said conspiracy, combination, confederacy and agreement between them the said Frederick Foering and Benjamin Williams, had as aforesaid, did draw a check on the said bank for the sum of 300 dollars." The count then proceeded specially to aver the drawing of divers other checks, at divers times, and then proceeded, "and the said Frederick Foering, at divers other times, did draw divers other checks on the said bank, and did cause and procure the same to be presented to the said bank for payment, and the same were respectively paid, he, the said Frederick Foering, well knowing that at such times respectively, he, the said Frederick Foering, had no adequate balance of moneys to meet the same, and that he was not a creditor of the said bank. And the said Benjamin Williams, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between them the said defendants had as aforesaid, did falsely and fraudulently omit to post divers of the aforesaid checks, and did falsely add up the amount of such the aforesaid checks as were posted in the aforesaid ledger of the said bank, and did thereby give to the account of the said Frederick Foering an appearance of having a balance of moneys to his the said Frederick Foering's credit, he the said Benjamin Williams well knowing that the said Frederick Foering had not at such times a balance of moneys in the said bank, and did then and there retain in his own possession the said checks, and did fraudulently, deceitfully and knowingly omit to charge the said Frede-

rick Foering with the same, whereby the said bank was then and there defrauded of a large sum of money, to wit, of the sum of $180,000, to the great damage of the said bank, &c." The second count was substantially the same.

It was urged, on behalf of the motion in arrest of judgment, first, that the offence specified was not indictable at common law, and secondly, that the conspiracy was not set forth with sufficient accuracy. The motion, however, was overruled by the court in *banc*, and judgment entered on the verdict.*

* To constitute a conspiracy, the purpose to be effected by it must be unlawful, either in respect of its nature, or in respect of the means to be employed for its accomplishment; and the intended act, where it has not a common law name to import its nature, must, in order to show its illegality, be set forth in an indictment for conspiracy, with as much certainty as would be necessary in an indictment for the perpetration of it; otherwise it would not be shown to be criminal, nor would the confederates be shown to be guilty. *Hartmann* v. *Com.* 5 Barr 60. But in an indictment for a conspiracy to cheat at common law, no overt act need be set out. *Clary* v. *Com.* 4 Barr 210; *Twitchell* v. *Com.* 9 Barr 211.

Commonwealth *v.* Wentworth.

[MARCH 17, 1823.]

It is a public nuisance, and indictable at common law, to place on the footway of a public street, a stall for the sale of fruit and confectionary, although the defendant pay rent to the owner of the adjoining premises, for the use of so much of the pavement as is occupied by him.

CERTIORARI to the Mayor's Court to remove an indictment for nuisance. The indictment set forth that the defendant "on the first day of March, 1822, at the city aforesaid, and within the jurisdiction of this court, with force and arms, &c., in the common and public street there, called Delaware South Third street, unlawfully and injuriously did put and place and cause and procure to be then and there put and placed, a stall for the selling and exposing for sale of fruit and confectionary, and the said stall in the said common and public street, on the day and year aforesaid, for the space of six hours, at the city aforesaid, and within the jurisdiction of this court, unlawfully and injuriously did cause to be and remain, whereby the said street and common highway, during the time last aforesaid, was very much obstructed and straitened, so that the good citizens of this commonwealth could not, through the said street and common highway, during the time in that behalf aforesaid, go, return, pass, repass, ride, and labour with their horses, carts, and carriages as they might, and were wont and accustomed to do, to the great damage, hinderance and common nuisance of all the good citizens of this commonwealth, going, returning, passing and repassing in, along and through the said public and common street, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

[Commonwealth v. Wentworth.]

The case was tried at *nisi prius* on the 20th November, 1822, and the following special verdict found.—"The jury find that the said street called Delaware Third street, in the city of Philadelphia, is a common and public street and highway of fifty feet in width. That the defendant, on the first day of March, 1822, put and placed on the brick pavement, on the west side of the said public street, between High and Chestnut streets in the said city, a stall three feet in height, three feet in breadth, and eight feet in length, for the selling and exposing to sale of fruit and confectionary, and caused the said stall to be and remain in the said street as aforesaid, on the day and year aforesaid, for the space of six hours; that the defendant paid to the owner of the house adjoining a certain rent; and that the said stall was not placed on the porch or steps of a house. If, upon these facts, the court should be of opinion that the law is with the commonwealth, the jury find the defendant guilty; but if the court be of opinion that the law is with the defendant, then they find for the defendant."

Per Curiam.—Judgment for the commonwealth, and the court order and adjudge that the defendant pay a fine of one dollar and the costs of prosecution.

Columbia Bridge Co. *v.* Kline.*

[NOVEMBER, 1825.]

A party must bring forward the several parts of his case in their order; and although the court has power to relax the rule in this respect, its refusal so to do is matter of legal discretion, not subject to writ of error.

It is not error that in charging the jury, the court, after answering a point submitted affirmatively, proceeds to qualify it by stating that if the facts were different from those assumed in the point, the law would be otherwise. The question always is, not whether a party is deprived of the advantage gained by an artful representation of a part of the case, but whether the court has laid down sound law for the decision of the whole.

When an agreement is invalid from the unlawfulness of its consideration, any subsequent agreement, based upon it, is equally invalid.

Though a defence between the original parties to a bond may be waived in favour of an assignee for a valuable consideration, who is encouraged to part with his money, by the acts, declarations, or even the silence of the obligor, yet where there is more than one obligor, it should appear that all joined in the acts which are relied on as a waiver.

Where an act of assembly stipulated that a corporation, before enjoying certain immunities, should give security to the court of common pleas, in such cases and in such manner as the court may think proper to require for the faithful payment and redemption of all the notes by them issued; *held*, that the bond of the corporation alone was not sufficient security within the act.

A corporation cannot maintain an action on a bond taken by it, or assigned to it, unless it be for a debt contracted in the course of its legitimate operations, and for an object finally promotive of the purpose for which it is incorporated; but such corporation would have a right to take a bond, or the assignment of a bond, for moneys advanced for the purposes of its constitution, or for any other object fairly promotive of the views and intentions for which the company was incorporated.

A corporation may be a trustee.

THE facts of this case sufficiently appear in the opinion of the court.

* This case was not reported at the time in consequence of a doubt, entertained by Chief Justice Tilghman, of the propriety of touching the question, of a corporation's capacity to hold in trust; but he, as well as Mr. Justice Duncan, fully concurred on all the other points.

[Columbia Bridge Co. v. Kline.]

The case was argued by *Mr. Hopkins*, for plaintiff in error, and *Mr. Buchanan*, for defendant in error.

Gibson, J.—Taking for granted that the evidence contained in the bill of exceptions was intrinsically competent to rebut what had come from the other side, the question is, was it offered in season? It was not produced till the party offering it had rested the evidence, on his part, at two different stages of the trial, after the reception of the evidence which it was proposed to rebut. He therefore had waived the benefit of it by not producing it at the proper time; after which the court was not bound to admit it. A party must bring forward the several parts of his case in their order, and although the court has power to relax the rule in this respect, it may refuse to do so; and the exercise of what is matter of legal discretion cannot be made the subject of error.

The remaining exceptions are to the opinion of the court on points submitted by counsel.

The bond on which this suit is brought was substituted for another which had been given for a part of the price of sixty acres of land, purchased by Jacob Kline, Isaac Ruth, and Isaac Mingle, at the enormous price of $50,000, with a view to reimbursement by dividing the whole into lots, and disposing of them by a lottery; and, in reference to this stage of the transaction, the court was requested by the counsel of the plaintiff to charge, that if Mifflin, the vendor, knew of the intention of the purchasers to make the property the subject of a lottery, it would furnish no objection to the recovery of the purchase money. This proposition was adopted by the court; but on a point made by the other side, the jury were at the same time instructed that if there was an agreement that the vendor should participate in the profits of the lottery, the whole contract would be illegal; and that neither he nor his assignee could recover. The objection made, is not to the sound-

ness of this direction, but to the manner of stating it, the counsel contending that he was entitled to have the opinion of the court separately and distinctly on the facts, as he had submitted them, without regard to other facts that might be supposed to exist in connexion with them. The opinion of the court was, in fact, separately delivered on the facts as they were propounded, although the judge, immediately afterwards, stated the law as it would arise out of them mingled with other facts which it was supposed might possibly be deduced from the evidence. But even were it otherwise, it would be preposterous to reverse for such a reason. It is the business of the court to furnish rules of decision applicable to every combination of the facts that may result from the evidence; and the question always must be, not whether a party has been deprived of the advantage likely to be gained by an artful representation of a part of the case, but whether the court has laid down sound law for the decision of the whole of it. To say that any thing else is error, would put an end to all fairness in trials.

The counsel for the plaintiff further requested the direction of the court, that the second bargain between the vendor and the purchasers, superseded the first, and consequently, that the rights of all parties were to be determined by it exclusively. The court did so direct, but added, that as the bond on which the suit is brought was given in lieu of a former bond executed for a part of the original purchase money, the question whether the consideration of it was legal, would still depend on the circumstances of the original transaction; and that the second bond would be affected by any thing that would have affected the first. I perceive no error in this. No doubt an entirely new contract, on a new consideration, and for a lawful purpose, would have been binding; but that there was such a thing, I do not understand it to be seriously pretended. The transaction in the presence of Mr. Barnitz, was evidently

nothing more than a modification of the original bargain, which, if made in despite of the acts of assembly for the suppression of lotteries, would not admit of confirmation by a subsequent agreement on the same basis, or one that should look to the attainment of any object which, at the time of the original bargain, was unlawful. The canker at its core would be incurable. The validity of the second bond, therefore, would depend on the circumstances which might affect the first; this is established by *Duncan* v. *M'Cullough*, 4 S. & R. 483, and the cases there cited.

The next ground of exception is the omission to charge that, although the vendor should be proved to have remitted a part of the bond, the jury ought nevertheless to find the amount of the penalty, to enable him to have execution for the sum actually due. It is obvious that this could have had no effect on the merits, for no jury is so dull, as not to know that the release of part of a debt, is not a release of the whole; and an exception of the sort ought therefore to receive no favour. But the position is not maintainable, that the plaintiff in an action of debt on the act of assembly, to recover a sum due by bond, is entitled to a verdict and judgment for the penalty, as at the common law. By the express provisions of the act he is required, in stating his demand, to go for the precise sum which he believes to be recoverable; and in case of recovery, the verdict and judgment is for the sum ascertained to be due. The counsel therefore had no right to a direction such as was required.

Again, the court was desired to charge, that if the jury should be of opinion that a bond of Jacob and George Kline for $1,178, borrowed for the use of the obligors, and a note of Jacob Kline, endorsed by Herr, for $800, were satisfied out of the money advanced by the plaintiffs, as the consideration of the assignment; and further, that the obligors received $300, out of the money so advanced for

the purpose of paying off incumbrances, so that they might be enabled to execute their agreement with Mifflin, the assignor, then the defendants would be precluded from setting up, against the assignee, any defence which they might have set up against the assignor; and for not having so directed the jury, exception is taken. It is clear, however, that these circumstances alone would not be decisive. A defence between the original parties may doubtless be waived in favour of an assignee for valuable consideration, who is encouraged to part with his money by the acts, declarations, or even the silence of the obligor. But when there are two or more obligors, it should appear that all joined in the acts which are relied on as a waiver. Now, it is no part of the proposition, that Herr, who was a surety, and could not be deprived of his defence without his assent, or indeed that any of the others in particular, participated in the acts which are alleged to be a waiver; and such participation, the jury were very properly instructed, was absolutely necessary to constitute a waiver that would affect all the defendants.

The next exception is, that the court refused to direct the jury to consider the acts of Kline, the principal obligor, and Mifflin the obligee, as the acts of Herr, the surety, although the latter may not have known of or assented to them. This proposition is so extravagant in itself, that particular remarks on it are unnecessary.

Thus far I have considered the points in the cause separately; not because I think them worthy of discussion, but because of the magnitude of the contest, rather than the difficulty of the law. What remains is more important.

The counsel for the defendants desired the court to direct the jury, that the plaintiff could not maintain an action on this bond. First, because it has not authority under the act of incorporation to purchase bonds: secondly, because the act of the 24th of February, 1820, which was passed to enable it to recover debts due to it, embraces debts due

which were contracted only in the course of its banking operations, to which class this particular debt does not belong: and, thirdly, because, if that act does embrace this debt, yet the preliminary security which it requires of the plaintiff has not been given. The court was of opinion, that the debt was not within the purview of the act, both because it was not intended to operate on debts for which suits were then depending, and because the transaction in question was not a banking operation, and therefore not forbidden by the 13th section of the act of the 21st March, 1814, the severity of which the act of 1820 was intended to mitigate; but that if it were within these two acts, the plaintiff had given sufficient security according to the true intent of the third section of the latter, by filing its own bond agreeably to the order of the court of common pleas of Lancaster county; and, finally, that independently of these acts, the plaintiff could not maintain an action on a bond taken by it, or assigned to it, unless it were for a debt contracted in the course of its legitimate operations, and for an object promotive of the purpose for which it was incorporated.

It does not appear that any previous debt existed; but the transaction seems to have been an investment of the funds of the corporation without any peculiar or distinctive circumstance. Whether it was a banking operation, depended on facts which were for the determination of the jury, and of which we could but imperfectly judge, if it were our province to do so. The section of the act of 1814 prohibits the issuing of the notes of individuals or of corporations instituted for other than banking purposes; and declares, that notes discounted, and "contracts relative to business, usually done by banking companies, which shall be done by, or made with unincorporated banks, individuals, or corporations for other purposes," shall be absolutely void. Now, the business done by banks consists in issuing notes payable to bearer, which pass by delivery as cash, in discounting notes, and in receiving deposits.

Judge SPENCER is of opinion that the principal attributes of a bank are comprised in its right to do these things; *The People* v. *The Utica Insurance Company*, 15 Johns. 390. But these are separate operations, which do not all concur in the same transaction; and either of them may or may not, according to circumstances, be a breach of the act of assembly. A bank may refuse to receive deposits, and may yet be a banking institution for every other purpose. So, instead of an accommodation note, it may require a bond or single bill, in which, those who in the usual course, pledge their responsibility for the borrower, by endorsing his note, are bound as principals; and some banks in this state have actually adopted that form of security. Nor, on the other hand, could an unlawful banking company elude the provisions of the act by pursuing the same course. The issuing of any but the notes of incorporated banks, was the principal mischief intended to be restrained, and where such notes are not paid in discharge of an existing debt, but are advanced on a credit or security of any kind, that alone will stamp the transaction with criminality. But although the court inclined to think the transaction was not a banking operation, it left the facts to the jury, with a direction that if they should be of opinion that it was such a transaction, then the plaintiff's case would not be borne out by the act of 1820, which was not intended to affect the rights of parties in suits then depending.

In this I heartily concur. The impolicy and injustice of *ex post facto* laws are so glaring, that no upright judge will believe that the legislature intended to divest or impair existing rights, unless where an intention to do so is so palpable as to force itself on the attention. What is the language of the legislature on the subject before us? "Before the said company shall be enabled to recover under this act, it shall be its duty to give security to the court of common pleas of Lancaster county, in such sum and in such manner as the said court may think proper to require,

for the redemption of its notes in circulation." Now security given, either before or after suit brought, is a compliance with the letter of the act, and therefore it stands indifferent, as regards the expressed intention of the legislature, at what time it is given, so that it be before recovery; but does it stand indifferent as respects the justice of the case? It must appear clearly that the legislature intended to subject these defendants to costs which accrued when they had a defence, before an intention to do so will be imputed to them; and in this respect our case is quite as strong as *Bedford* v. *Shilling*, 4 S. & R. 401.

But I by no means concur that the bond of the plaintiff alone is security, within the true intent and meaning of the act. The common pleas of Lancaster county doubtless had unlimited discretion in determining the amount of the security, and the form in which it should be taken; but here its power over the subject ended. It could not dispense with substantial security of some sort. Now I will not stop to consult the lexicographers for the meaning of the word "security;" we know what it means in the common parlance and transactions of the world, and in what sense it has for the most part been used by the legislature. No one can shut his eyes so as not to see that the object of this section was to require substantial responsibility in addition to that of the plaintiff, for the payment of its own debts, before it should be permitted to collect its debts from others; not to require it to give a bond in addition to its notes, which would be quite as beneficial to the holder. This, then, was an error; but one which was in favour of the plaintiff, who for that reason is precluded from making it a ground of reversal.

Then laying the acts of 1814 and 1820 entirely out of the case, the remaining inquiry will be, whether the court was right in its opinion as to the right of the plaintiff to take an assignment of this bond under the act of incorporation.

It is said, particularly in the case of *Sutton's Hospital*, 10 Rep. 31, that to every general corporation the law tacitly annexes certain incidents; such as capacity to sue and be sued, to purchase land, and to do almost all other acts as natural persons may. But this must be understood of acts that are within the scope of the business or duties which the corporation was created to perform. The law annexes no power as inherent, and therefore existing independent of the particular provisions of the charter. A corporation being the creature of the legislature, derives all its powers from the act of its incorporation, and such incidents as are tacitly annexed to it, are those implied powers which are necessary to the ends of its existence. The legislature may, if it will, constitute an artificial body for no particular purpose, and endow it with the attributes of a natural person; but, in this country, corporations are never created but for specific objects, and with capacity commensurate to their duties. To assume for them any greater capacity would be a fraud on the legislature, which otherwise might be erecting an insurance office, whilst it supposed it was incorporating a church, or in place of an hospital, it might be creating a bank. But every affirmative grant, implies a negative as to the grant of any thing else, and therefore a corporation for a specific purpose is no corporation for any other purpose, and consequently can, for such other purpose, do no corporate acts to affect its own rights or those of other persons. In a word, it is recognised as having a political existence only when it is viewed in a particular aspect. It is a question not altogether settled, whether a corporation can be a trustee: and although the weight of authority seems to be in favour of the affirmative, I cannot accede to the reasoning of the judge who delivered the opinion of the supreme court of Massachusetts, in *The Trustees of Phillips Academy* v. *King*, 12 Mass. 555, and who thought that to affirm that a corporation has not capacity to hold in trust because its inte-

rest and duties cannot be involved in the execution of a trust, would beg the question. In *Jackson* v. *Hartwell*, the supreme court of New York thought differently. On the grounds of authority, however, I would incline to the opinion held in Massachusetts, for although on the enactment of the statute of uses, it was held, that no one could be seized in trust, who could not be seized to a use; 1 Cruise's Dig. Trust, ch. 1, § 68, yet in later times we find, that devises to corporations in trust are held good. *Green* v. *Rutherforth*, 1 Ves. Rep. 462; *Kildare* v. *Eustace*, 1 Vern. 405; *Felstead Hospital* v. *Foach*, 2 Vern. 410. But, however this may be, it cannot shake a principle so deeply founded in reason as that which I have stated, and one which is recognised in *Head* v. *The Providence Insurance Company*, 2 Cranch 166; *Wales* v. *Stetson*, 2 Mass. 143; *Denton* v. *Jackson*, 2 Johns. Ch. 325; *Jackson* v. *Hartwell*, 8 Johns. 422; and more distinctly in *The People* v. *The Utica Insurance Company*, 15 Johns. 384. But with this principle, the charge of the court below was in strict accordance. The jury were directed that the corporation would have no right to purchase lands or discount notes; "but that it would have a right to take a bond, or the assignment of a bond for moneys advanced for the purpose of the institution; or for any other object fairly promotive of the views and intentions for which the company was incorporated. This is an accurate statement of the law applicable to the subject generally; and if a particular exposition of it in reference to the special facts in evidence had been desired, the point arising on these facts should have been suggested. But there was nothing in the case to make it an exception from the general rule. The plaintiff is invested with powers, common to most bridge companies, to increase its capital if it should be found necessary, to accomplish the object, by creating additional shares; and to divide the profits, after deducting a sum deemed necessary as a contingent fund, to rebuild or repair the bridge, as accident or

decay might render it necessary. A construction which should require this fund to be kept in the coffers of the company would be unnecessarily severe. It might, without doubt, be put out at interest, as usual with the surplus capital of insurance companies, provided it were done *bonâ fide*, and not to give colour to transactions which are foreign to the business of the corporation. Had such been the nature of the investment in the case before us, the legality of it could not be questioned. But no point founded on the supposed existence of circumstances, sufficient to take the case out of the general rule, was made for the opinion of the court; and it is probable that none such resulted from the facts given in evidence. The charge, therefore, was in every respect unexceptionable.

On a full consideration of all the points in the case, it is the opinion of this court, that there is no error in the record. Judgment affirmed.*

* The question of the right of a corporation in Pennsylvania, to hold property in trust, was considered and determined by the supreme court of the United States, in *Vidal* v. *Girard's Executors*, 2 How. 129, where it was ruled that the corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise, inasmuch as the statute of 32 & 34 Hen. VIII., which excepts corporations from taking by devise, is not in force in Pennsylvania. And where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do: if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compelled to execute it, but the trust, (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust.

Commonwealth *v.* Sylvester.

[March, 1827.]

A count for a common law misdemeanor may be joined with a count for a statutory misdemeanor, and on a verdict of guilty on each, the court will impose, if it think proper, a separate sentence on each.

This was a case removed from the mayor's court to the supreme court, by a special allocatur.

The indictment, which was drawn under the act of 2d April, 1811, § 27, presented in the first count, that the defendant "unlawfully did sell and expose to sale, and cause to be sold and exposed to sale, a lottery ticket in a lottery not authorized by the laws of the commonwealth, which said ticket was in the words and figures following, that is to say, (setting forth the ticket) contrary," &c. The second count averred that the defendant, "together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, did unlawfully and wickedly conspire, combine, confederate and agree together, unlawfully and wickedly contriving and intending to acquire unjust and illegal lucre to themselves, to sell and expose to sale, and caused and procured to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of this commonwealth, to the evil example," &c. The defendant having been convicted on each count, a motion in arrest of judgment was made, on account of the alleged misjoinder of counts, and the irregularity in setting out the offence.

Mr. J. R. Ingersoll, for the motion; *Mr. Pettit*, and *Mr. J. C. Biddle*, contra.

The court held, that the counts sufficiently set forth the offence, and that there was no misjoinder, and sentenced the defendant to a fine of $200, to the Union Canal Company, being the statutory punishment, on the first count; and to a fine at common law on the second.

M'Dermond et al. *v.* Kennedy.

[MAY, 1839.]

A municipal corporation, under a power to make such by-laws as shall be necessary "to promote the peace, good order, benefit and advantage of the borough," and to assess such taxes as shall be necessary for carrying the same into effect; is not authorized to levy a tax for the payment of part of the expense to be incurred by a rail-road company in bringing the line of their road nearer to the town than originally located.

ERROR to the common pleas of Cumberland county.

This was an action of trespass, brought in the common pleas of Cumberland county, by the defendant in error against the plaintiffs in error, who were the high constable, (being a collector of taxes) the chief burgess, assistant burgess and town council of the borough of Newville.

The declaration was in common form, charging the defendants with taking and carrying away a dearborn wagon, the property of the plaintiff.

The defendants pleaded specially that James Kennedy was seized of a house and lot in Newville, which was an incorporated borough, having powers under their charter to assess, levy and collect taxes, &c.; that a tax was assessed upon the property of the plaintiff, that a warrant was given to Joseph M'Dermond to collect the same, and that the wagon was taken by virtue thereof, for the payment of the said tax. The object of the parties was to decide the question of law, which arose upon the following facts:

In 1835, the Cumberland Valley rail-road company had located their road at the crossing of Big Spring, about one mile above the borough of Newville. An application was made to the board of directors, by the citizens of Newville, so to change the location as to bring the road near to the town, that it might derive advantages from the trade and travel which it would bring. The location thus prayed

for was more expensive to the company, to the amount of about $5,000, and it was proposed, that if the borough of Newville and citizens, would subscribe one-half of the expense, ($2,500) the company would make the alteration, and so locate the road as that the borough of Newville would derive the advantages. Individuals interested in the borough did subscribe $1,500, and nine-tenths of the property holders of the borough petitioned their council to subscribe, on behalf of the borough, $1,000. In consequence of which an ordinance was passed, making the subscription of $1,000, payable, one-third on the 1st of April, 1836, one-third when the work is half-finished, and the residue when the work shall be completed; and authorizing a loan to be made, on the faith of the borough, to meet the payments. The loan was obtained, and the money paid by the borough to the rail-road company. Subsequently, the council of the borough assessed a tax of five mills on the dollar, "for the purpose of defraying the current expenses of the borough." It was the collection of this tax from the plaintiff, James Kennedy, by the levy on his wagon, which was the trespass complained of. The counsel of the respective parties agreed to put the cause upon the question, whether the borough of Newville had the legal power to make such a subscription to the Cumberland Valley rail-road company, as had been made, and to assess and collect taxes for its payment.

The sixth section of the act of incorporation, passed the 6th of February, 1817, provides that it shall be the duty of the town council to hold quarterly meetings, &c., "at which meetings they may make, enact, revise, repeal and amend all such by-laws, rules, regulations and ordinances as shall be determined by a majority of them, necessary to promote the peace, good order, benefit and advantages of the said borough; particularly, of providing for the regulation of the markets, improving, repairing and keeping in order the streets, lanes, alleys and highways, ascertaining the depths

of vaults, sinks, pits for necessary houses, and making permanent rules relative to the foundation of buildings, party walls and fences; they shall have power to assess, apportion and appropriate such taxes as shall be determined by a majority of them necessary for carrying the said rules and ordinances from time to time into complete effect; and also to appoint a town clerk, treasurer, two persons to act as street and road supervisors, a clerk of the market, and a collector, annually, and such other officers as may be deemed necessary from time to time, and the same officers from time to time to remove for misdemeanor in office; which meetings of the said town council shall be held at such convenient place as a majority of them shall think proper, in said borough, until a town house is erected: *Provided*, that no by-law, rule, or ordinance of the said corporation shall be repugnant to the constitution or laws of the United States or of this commonwealth, and that no person shall be punished for a breach of a by-law or ordinance made as aforesaid, until ten days have expired after the promulgation thereof, by at least four advertisements set up in the most public places in said borough: and provided also, that in assessing such tax, due regard shall be had to the valuation of taxable property taken for the purpose of raising county rates and levies, so that the said tax shall not, in any one year, exceed one-half cent in the dollar of such valuation, unless some object of general utility shall be thought necessary, in which case a majority of the taxable inhabitants of said borough shall approve of and certify the same in writing, under their hands, to the town council, who shall proceed to assess the same accordingly."

The defendants requested the court to charge the jury to the following effect: 1. That it was within the scope of the legal powers of the borough authorities of Newville to assess and collect taxes, and it was not the duty of the collector to inquire or know the purpose to which the taxes

were to be applied; and if the appropriation by the council was illegal, the collector (M'Dermond) would not be a trespasser in the execution of his warrant. 2. That under the act of incorporation of the borough of Newville, the town council has the power to levy and assess taxes, and to authorize their collection by a person to be appointed by them for that purpose, to whom it may give authority to collect the same by distress and sale of the goods and chattels of inhabitants liable to taxation. 3. That the inhabitants of any borough or county liable to taxation may not resist the payment of taxes lawfully assessed, because they do not approve of the object for which they are to be applied when collected.

Reed, President, charged the jury as follows:—The word borough refers only to corporate rights. The corporation can only act in reference to corporate rights and duties. The officers have no power over private property, except for corporate purposes.

Making a rail-road, not within the limits of the borough, cannot touch or affect corporate rights. It may directly or indirectly affect private rights, but the regulation of private rights is not vested in the borough. How could the borough be benefited or injured by the rail-road? It is not a borough subject. It does not touch the borough. It affects no borough rights. The rights alleged to be affected are private rights, never to be intrusted to the management of the corporate functionaries.

The corporation has personal identity to the extent, or for the purposes indicated in the charter, for borough purposes and none else. Borough rights, corporate rights, are distinct from mere private rights of property. If this right is maintained in the borough of Newville, then the inhabitants of Newville have given over "the inalienable right of acquiring, possessing and protecting property;" for, if the council can raise a tax and grant the avails to

the rail-road, because they believe it to be to the advantage of the borough, then they may do any thing else which they may deem advantageous, *any thing else*, for there is no connexion, no relation, between the rail-road and the borough.

The officers of the borough are for the borough, for managing the affairs of the borough. By the third section of the act of incorporation, the general purpose of the act is exhibited; they all refer to the borough, to the corporation; the enumeration of the powers in the sixth section also refers to borough purposes, corporate rights, rights which they are to enjoy as an association; the private rights, and private rights of inhabitants distinct from corporate rights, are not embraced. The increase or decrease of the value of a man's house and lot, is not an incident of a corporate, but a private right. Things relating to social convenience and safety, are only embraced in the corporate powers.

Though manufacturing silk, establishing forges and furnaces, constructing a bridge over the Connodoguinet or the Schuylkill, or a turnpike over the north mountain, by the burnt cabins, or any thing else—though any of these should be a direct benefit to the inhabitants of Newville, undisputed, it cannot be that a tax may be raised and appropriated at the mere will of the town council, if not exceeding five mills in the dollar.

If they can appropriate money to a road half a mile from the borough, they may do so at a distance of fifty or one hundred miles.

We conclude, that no tax can be laid for any other than borough purposes, and that the construction of this rail-road was not one. It had nothing to do with the borough —had no connexion with it, had no reference to it, either directly or indirectly.

We think there can be no difficulty as to the fact of a tax having been laid mainly for paying this money to the

rail-road. The minutes of the board exhibit the whole proceeding, and the accounts of the treasurer show the appropriation. The appropriation to the rail-road was set forth in the minutes, and the ordinance passed for raising a tax; it was raised, and of the three hundred dollars raised in one year, two hundred and seventy-three dollars, or thereabouts, of it was paid to the rail-road company, in accordance with the ordinance of the town council. If these are the facts, in law, the plaintiff would be entitled to recover. Whether a recovery can be had against the collector or not, the plaintiffs cannot, do not, insist, as there are others against whom they allege the action must be sustained. It is stated, too, on the notes by consent, that the main object of the action is to try the right. The mere amount paid by the plaintiff is only asked as damages. The whole is two dollars and ten cents.

The learned judge then proceeded to read and answer the points of the defendants, as follows:

The first point was answered affirmatively, with this qualification; that if the laying of the tax was illegal, for an illegal purpose, on the principles stated in the general charge, and the other defendants are liable on the principles we have stated, as we think they are, and on the issues and the form in which the trial has been had, we think that the collector, M'Dermond, may be liable in law as well as the other defendants. If he had designed to justify under a warrant or authority from the other defendants, he should have so pleaded; but he has mixed his fate with theirs, by pleading only the general issue, and going on to trial with them. The second and third points were answered affirmatively, it being said, however, that "when the tax is illegal, for an illegal purpose, they may resist, and if their property be forcibly taken and sold, an action of trespass will lie for the damages."

The jury, under the direction of the court, found a verdict for the plaintiff.

[M'Dermond *v.* Kennedy.]

The case was taken to the supreme court, on error, and having been argued by *Mr. F. Watts*, for the plaintiffs in error, and by *Mr. Biddle* and *Mr. Williamson*, for the defendant in error, the judgment was affirmed.*

* The result of the publication of the foregoing case was the passage of the act of the 27th March, 1848, whereby the subscription of the city of Philadelphia to the Pennsylvania rail-road company was legalized, and the county of Allegheny, the cities of Pittsburgh and Allegheny, and the municipal corporations of the county of Philadelphia, were empowered to subscribe for shares of the capital stock of the same company, and to borrow money for that purpose. And the further to facilitate such subscriptions, the act of the 15th May, 1850, authorized a majority of the several boards of commissioners of the districts referred to in the prior act, to make such subscriptions;—the charters of some of the corporations requiring a vote of two-thirds for such an object.

Blenon's Estate.

[April 17, 1843.]

Testator devised the residue of his estates "to the different institutions of charity and beneficence, constituted and established at Philadelphia, for the relief of the unfortunate and of those who live under the infliction of infirmities, and of every sort of privations, without any distinction of sect or religion;" and excepted "from these different institutions of charity and beneficence, all those which are directed, conducted and administered by ecclesiastics, whatever may be the sect to which they belong." *Held*:—

1. That no friendly, beneficial or literary society, nor any incorporated society, nor any society located out of the corporate limits of the city of Philadelphia, was entitled to take under the will.

2. That all societies for the alleviation of the privations and infirmities of individuals, whether white or coloured, by supplying or relieving their *bodily* and personal wants and necessities *gratuitously*, and no others, were entitled.

3. That societies of a religious character, whose benefits were exclusively confined to a particular sect, were not excluded; the true construction of the will being, that all should participate, be their sect or religion what it might.

4. That the fact of a clergyman being *one* of the managers of an institution, would not exclude such society from the benefits of the will; the institutions excepted being those *exclusively* or *mainly* under ecclesiastical direction.

[Blenon's Estate.]

APPEAL from the orphans' court of Philadelphia.

This case depended upon the construction of the eighth item of the decedent's last will and testament, dated May 12th, 1836, as follows:

"Eighthly, I give and bequeath, in full ownership, to the different institutions of charity and beneficence, constituted and established at Philadelphia, for the relief of the unfortunate, and of those who live under the affliction of infirmities and of every sort of privations, without any distinction of sect or religion, and after all the legacies and donations which I make herein shall be complied with and discharged, the residue of my estate, so that no individual shall be able to make any claim, as I do not recognise any other heirs or claimants of my estate, which is the fruit of my labour and industry, except the persons designated in the present will, which, without any restriction or addition, is positively the expression of my last will and intentions. I except from these different institutions of charity and beneficence all those which are directed, conducted and administered by ecclesiastics, whatever may be the sect to which they belong. Spiritual affairs alone and not temporal are competent to them. Finally, I do not think that their kingdom is of this world."

The accounts of the executors to the above estate having been filed, auditors were appointed, August 18th, 1837, by the orphans' court, to settle the said accounts and make distribution of the assets according to law. In the performance of the latter part of their duty they made the following report, to wit:

"The principal questions that arose under the construction of the eighth, or residuary clause of the will, were as follows, viz.:—1. The meaning of the expression 'different institutions of charity and beneficence.' 2. The construction of the words 'constituted and established.' 3. The construction of the words 'at Philadelphia.' 4. The construction of the rest of the sentence defining the objects of

the societies as to relieve afflictions, of infirmities, and of every sort of privations. 5. The expression 'without any distinction of sect or religion.' 6. The construction of the excepting portion of the residuary bequests.

"First:—A large number of societies usually known as beneficial societies presented their claims under the will, and it was in evidence that they were not, strictly speaking, charitable institutions for the relief of the poor, but by their fundamental regulations each member was bound to contribute an equal amount to the treasury of his society, which thus formed a common fund for the relief of the members when sick or disabled from work, or to be paid to the family of a deceased member for funeral expenses, and these benefits were claimed by the members as a pecuniary right, the non-payment of which might be followed, on their part, by a suit at law to recover the same.

"Objections were made by the counsel for other societies, that these institutions were not societies of charity and benevolence, within the meaning of the testator, but were to be viewed merely in the light of mutual assurance companies, in which each member put in a given amount of his money, and in turn drew out from the common stock an ascertained amount as his due, and not as a favour or a charity; that the testator meant to confine the bequest to institutions to relieve the poor and infirm, and that these societies could not be fairly considered as being either for 'charity,' or 'beneficence.'

"On behalf of this class of societies, it was contended that they were distinctly embraced within the letter and spirit of the will, a fair construction of which would include these societies, that if their objects were not in the popular sense for charity, they were strictly for acts of beneficence, and that those acts of beneficence were extended only to those labouring under the 'infirmities, afflictions, and privations,' referred to by the testator.

"A very elaborate and interesting argument took place

between the contending counsel, not only on the construction of this clause of the will, but of the others, and of the minor points that incidentally arose; the parties went fully into the merits and the law, and cited many authorities, but as this report is necessarily long, the auditors will, throughout, content themselves with a brief statement of the various questions that were discussed, and of their decision in each given case; as any other course would, in their opinion, unduly amplify the report without any practical good to result therefrom, and in case of any exceptions hereafter, the points will be much better presented by the counsel and parties interested.

"In stating the various decisions, the surviving auditors have the pleasure to state that in all the questions presented, their opinions were unanimous, and all the important principles were settled and agreed upon by them in the lifetime of their lamented colleague, Mr. Biddle. In this case the auditors are of the opinion, that these societies are within the fair construction of the will, as institutions of beneficence, for the relief of those living under the 'affliction of infirmities, and of every sort of privation,' that they are very numerous, and their existence must have been known to the testator; that the objects were to relieve their members from the humiliation of absolute pauperism; while the relief afforded was only to be in the emergencies contemplated by the testator. The auditors are of opinion that these institutions are institutions of beneficence, under the will, and they consider furthermore, that similar principles were many years ago settled, in the decision of similar questions which arose upon the construction of John Keble's will; Supreme Court, December Term, 1809.

"2d. The words 'constituted and established.' Under the construction of these words, unincorporated societies cannot participate in the benefits of the will; the auditors are of opinion that the testator meant to include none but societies organized, constituted and established in some

tangible and legally recognised shape, to wit, those whose existence or establishment arose and were established by law, to wit, through a charter. Should an opposite construction prevail, no rule could be fixed or limit designated, whereby the organization of any number of individuals could be deemed or construed to mean a regularly established society, and the auditors think that the safe and legal construction of these societies, is, to consider them in no other light than that of a partnership, and that the charter alone gives vitality to the organization of a number of individuals. This decision will exclude from the benefits of the will, all the societies after that numbered 162, on the eighth and ninth sheets of this report, except No. 177 and 178, all of which were incorporated after the death of the testator, and not being entitled to participate in the fund at the time of his decease, no subsequent act could give them this right.

"3d. The words 'at Philadelphia.' While some contended that the benefits were meant only for those societies organized within the corporate limits of the city of Philadelphia, others contended that every institution within the bounds of the city and county was meant. The auditors do not adopt either of those views, but think that the words 'at Philadelphia' mean that which in popular estimation of a great town is usually understood to be city, viz., the town and suburbs or adjoining built districts; and under this construction they are of opinion, that societies constituted and established in the corporate limits of the city of Philadelphia, the incorporated townships and districts of the Northern Liberties, Kensington, Spring Garden, Southwark, Moyamensing, and the borough of West Philadelphia, are entitled to participate.

"4th. The construction of the words 'for the relief of the unfortunate, and of those who live under the affliction of infirmities and of every sort of privations.' A number of societies for diffusion of education and knowledge, by means

of seminaries of learning and libraries, together with other societies whose objects were meritorious, presented their claims under this portion of the will. If the testator had meant to include every meritorious society or institution, it is fair to presume he would have used apt words to have expressed his intentions, and not by distinct provisions have limited his bounty to 'institutions of charity and beneficence for the relief of the unfortunate, &c.'

"The auditors think that the infirmities and privations referred to were of a bodily character, such as poverty, sickness, or decrepitude, except perhaps the mental privation of reason. This construction will exclude all infant schools, sunday schools, and other seminaries of learning, all library companies, the colonization society, the abolition society, the society for alleviating the miseries of public prisons, the fuel saving society and others, all of which are collected and numbered, Nos. 5, 11, 16, 21, 22, 44, 55, 85, 102, 125, 142, on the 2d, 3d, 4th, 5th, 6th and 7th sheets of this report.

"The Wills' Hospital is also to be excluded; this is a legacy by J. Wills to the city of Philadelphia, in trust, to dispose of the fund for a particular object. The hospital itself is only a building, and not an institution, the bequest is but an appropriation of James Wills' money to a particular object of charity, and the city of Philadelphia is the trustee to carry that object into effect: the Wills' Hospital cannot with propriety be called an institution constituted and established within the meaning of the will, or the implication of the law.

"5th. The expression 'without any distinction of sect or religion.' It was contended that no societies of a religious character could come in, if their benefits were exclusively confined to a particular sect: but the auditors think that the true construction of this portion of the will is, that all societies should receive the fruits of the testator's estate, be their sect or religion what it might.

"6th. The clause excepting institutions governed by ecclesiastics, &c. The auditors are of opinion that the mere fact of a clergyman happening to be one of the directors or managers of an institution, should not exclude a society from the benefits of the will; they think that the institutions referred to in this excepting clause, were institutions exclusively or mainly under ecclesiastical direction or influence. Such as churches and chapels, monasteries, convents, &c.

"No such institutions made any claims before the auditors, and the question never arose on this head except in the case of St. John's orphan asylum. This institution is wholly charitable, being for the relief and support of poor children; it is chiefly endowed by members of the catholic church, though its benefits are not necessarily, by the terms of their by-laws, confined to members of that sect. It is governed by a board of thirteen directors, two of whom are the bishop of the catholic church, for the time being; and the pastor of St. John's catholic church, for the time being; the other eleven being laymen by the express regulation of the society.

"It was contended, that as the bishop and pastor were directors in right of their offices, this was such an ecclesiastical direction as would exclude this institution, but the auditors are unable to concur in that view, the two officers referred to forming but a very small integral portion of the board, and the laymen having in numbers, an overwhelming and controlling influence. They accordingly report this institution as one among those entitled for the benefits.

"Some other questions arose, which the auditors think right to present to the court, viz.:—7th. The right of societies composed of negroes or people of colour, to participate in the bequest. It was objected that the testator never meant to include these societies, and that under the authority of the case of *Hobb* v. *Fogg*, in 7 Watts, they are destitute of the rights of citizenship. The auditors find nothing on the face of the will to warrant such a con-

struction, no such limit to the testator's bounty being therein fixed, and the decision of the supreme court goes solely to the question of their political and not civil rights.

"8th. Several societies were established for mixed objects, some within the meaning of the will and some not, as for instance, the German Society, which is a charitable society having a library; the auditors think that these institutions should participate because of the parts within the meaning of the will, if such parts were the main objects of the society and not mere incidents."

To this report numerous exceptions were filed, upon which the orphans' court made the following decree:—"This cause came on to be heard upon exceptions to the report of the auditors appointed by this court, and was argued by counsel, on consideration whereof, it was ordered, adjudged and decreed by the court, that so much of the auditors' report as relates,—1. To the construction of the words "constituted and appointed." 2. To the construction of the words "at Philadelphia." 3. To the construction of the expression "without distinction of sect or religion." 4. To the construction of the excepting portion of the residuary claim, be and the same is hereby confirmed.

"And it is further ordered, adjudged, and decreed,—1. That no friendly or beneficial society is entitled to any share in the bequest of the testator. 2. That all societies for the alleviation of the privations and infirmities of individuals whether white or coloured, by supplying or relieving their bodily and personal wants and necessities gratuitously, and no others, are entitled to a portion of a share in the bequest of the testator. 3. That Wills' Hospital is entitled to a share in the bequest of the testator, and that so much of the said auditors' report as is inconsistent with this decree, be and the same is hereby reversed.

"And it is further ordered, that the said report be referred back to the said auditors, to make from their notes a detailed statement of the several societies entitled to, and ex-

cluded from a participation in the bequest of the testator by the principles of the decree, with directions to report on or before the 30th inst."

An appeal was taken from this decree to the supreme court, and a *certiorari* issued to the orphans' court. A number of exceptions from various parties in interest were filed—and after argument, the following decree was made by the supreme court.

"It is hereby ordered and decreed by this court, that so much of the decree of the orphans' court as gives portions of the fund remaining to be distributed, according to the will of Peter Antoine Blenon, to the societies constituted and established within the limits of the incorporated townships and districts of Northern Liberties, Kensington, Spring Garden, Southwark, Moyamensing, and the borough of West Philadelphia, which are located out of the corporate limits of the city of Philadelphia, and therefore not the objects, as we conceive, of the testator's bounty, according to the tenor of his will, is annulled and reversed, and the residue of the decree is affirmed. So that the whole fund shall be paid to, and distributed among, the remaining societies mentioned in the decree of the orphans' court, as entitled to portions thereof. And in order to effect this, it is referred to the clerk of this court to ascertain the societies mentioned in the decree of the orphans' court, which are located within the said incorporated townships and districts of the Northern Liberties, Kensington, Spring Garden, Southwark, Moyamensing, and the borough of West Philadelphia. And the same being thus ascertained, it is further ordered, that they be stricken out of the decree, as not entitled to any participation in the fund remaining to be distributed agreeably to the will."*

* The subject of bequests for pious and charitable uses, was very fully considered by the circuit court of the United States for the eastern district of Pennsylvania, at the April term, 1833, in the case of *Magill* v. *Brown*, which involved the construction of the will of Sarah Zane, deceased.

[Magill *v.* Brown.]

The following sections of the will are those reviewed in the opinion of the court.

9. I give to the yearly meeting of Friends, held in Philadelphia, of which I am a member, eight acres of meadow land, situate on Greenwich Point road, being part of thirty acres belonging to my dear father, with the flats thereunto belonging, to be kept by the yearly meeting aforesaid for the purpose of a fund, the income of which, after keeping it in good order, to be paid as an annual subscription into the yearly meeting's stock.

10. I give most affectionately to the five monthly meetings of women Friends, held in Philadelphia, viz., Philadelphia monthly meeting, monthly meeting of the northern district, monthly meeting for the southern district, monthly meeting for the western district, and Green street monthly meeting —to each of the above said monthly meetings two hundred dollars, making in the whole one thousand dollars, to purchase ground rents; the income whereof I request to be received annually in the monthly meetings' collections, towards the relief of the poor members belonging thereto.

11. Whereas, about the year seventeen hundred and fifty-nine, Captain Newcastle, an Indian chief or messenger, ordered thirty pounds, Pennsylvania currency, to be paid to my dear father, for the use of his two cousins, a boy and a girl. The boy soon after died. The girl, named Betty, received a part of the above thirty pounds at different times, by Thomas King, an Indian chief; but as no information could be obtained of said Betty for forty years; and the residue of the thirty pounds is now in my possession, I am desirous that the full sum of thirty pounds principal, with the interest from the year seventeen hundred and fifty-nine until the time it is paid, which I desire to be into faithful hands; therefore I will and direct my executor to pay to the treasurer of the committee of the yearly meeting of Friends, held in Philadelphia, appointed to relieve the Indians, for the benefit of said Indians, according to their best judgment in justice and equity.

12. I give to my executors a legacy or sum of three hundred dollars, to be paid by them to the treasurer of the committee of the yearly meeting of Friends, held in Philadelphia, appointed to relieve the Indians, to the benefit of said Indians.

17. I give to my executors the sum of one thousand dollars, to pay to the treasurer of the committee appointed by the yearly meeting of Friends, held in Baltimore, for the transactions of the relief and benefit of the Indians, that the said yearly meeting, with the yearly meeting of Friends, held at Mount Pleasant, in the state of Ohio, hath under their care, toward civilization, having the tribe of Tuscaroras first in view, if to be found within two years.

18. I give affectionately to Friends composing the Baltimore yearly meeting, five hundred dollars, to be realized in that city, so that the interest or income thereof be annually paid into their collection toward their yearly meeting stock, if one exists; if not, I will, if it be the mind of Friends belonging thereto, the encouragement to establish one.

19. I give affectionately to Friends composing the yearly meeting, held at Mount Pleasant, state of Ohio, five hundred dollars, to be realized so that the interest or income thereof be annually paid into their collection toward their yearly meeting stock, if one exists; if not, I will, if it is the mind, and

agreeable to the Friends belonging thereto, the encouragement to establish one.

20. I give to the select members belonging to the monthly meeting of women Friends, held at Hopewell, Frederick county, Virginia, five hundred dollars, to be realized in the town of Winchester, in the same county, the interest or income issuing therefrom to be annually paid into the treasury of the above said monthly meeting's stock, towards the relief of the poor belonging thereto.

21. I give to my dear friends composing Centre preparative meeting, belonging to Hopewell monthly meeting, the sum of five hundred dollars towards enlarging Friends' monthly meeting-house in Winchester, if that meeting think it expedient, and to assist building a stone wall, so as to enclose the whole lot whereon the said meeting-house is erected.

22. I give to the citizens of Winchester above said, one thousand dollars to purchase a fire-engine and hose, to be kept in best repair, with my affection and gratitude.

31. Whereas, the heir of the late Elizabeth Roberts, daughter of Joseph Galloway, formerly of Philadelphia, hath deposited a bond of one hundred pounds, Pennsylvania currency, in the hands of Wm. Rawle and Joseph Jenks, agents for the estate of Elizabeth Roberts' daughter, now in Great Britain; I, believing the above said bond to be given by my brother Isaac Zane, of Virginia, a number of years since—the bond for many years out of reach; the interest hath not, that it appears, been paid: I will and direct my executors to pay the said one hundred pounds principal, and the legal interest thereon from the day of its date till paid in full.

Lastly. I do nominate and appoint my respected friends Samuel Coates and of Philadelphia, and Jacob Rinker, of Virginia, executors of this my last will and testament; giving them, my above named executors, full power to sell by private sale my house in Chestnut street, to meet the payments herein directed; and if that be insufficient, to sell Marlbro' estate, in Virginia, belonging to my late brother, Isaac Zane: hereby revoking all former and other wills by me heretofore made, and declaring this to be my last will and testament. In witness whereof, I hereunto set my hand and affix my seal, in Philadelphia, this twenty-fourth day of the third month, in the year of our Lord one thousand eight hundred and nineteen."

The following elaborate and learned opinion was delivered by

Baldwin, J.—This case arises on the will of Sarah Zane, a member of the society of friends, who in the body thereof, describes herself as of the city of Philadelphia: she died in Virginia, but as it has not been questioned, we shall assume this to have been the place of her domicil at the time of her death; the law of the state must therefore govern her disposition of her personal property, as well as of her real estate situated here. 1 Binn. 336, 44; 3 R. 318; 3 Penn. Rep. 187, 8.

The questions which have been made in the argument, and those which necessarily arise in the case, are of the most interesting kind; involving the capacity of the Quaker societies of this and other states, to take real or personal estate by devise, without a charter of incorporation; their right to enjoy

it for their own use, as a body united for the purposes of religion, charity and education; and what now are, by the law of the land, pious and charitable uses, for which valid donations can be made by deed or will.

In referring to the history of the settlement of this state, the principles of its first settlers, the character of its founder, his systems and institutions, it would seem not a little surprising, that such questions could have remained open till this time: if there are any subjects on which the law could be supposed to be settled, it would be the rights of religious societies and charitable establishments. If there was any part of the law of England which could be congenial to the spirit and policy of the colony, and likely to be adopted by a society of men who sought an asylum from persecution for religious opinion, it would be that which would afford the best protection in the enjoyment of their rights, privileges, immunities and estates, as a religious society. If there were any laws which they would be disposed to leave behind them, they would be those which grew out of feudal tenures, a spirit of persecution, or an established religion; the last laws which they would introduce, would be those which created a forfeiture of all land conveyed to a society incorporated for the purposes of charity and religious worship, according to their own consciences, without regard to the mode of celebrating divine service as prescribed by law, or which prevent a donation for such uses from taking effect, without a special license by charter or act of assembly. Such would be the natural conclusion from the known and practical principles of civil and religious liberty, which have distinguished the policy and jurisprudence of this state through all time, as founded on a system of "free and unlimited catholicism" in matters of religion, of expanded benevolence in matters of charity, and equality of rights in the enjoyment of property.

These leading features are so strongly impressed on the written laws, and enter so deeply into the customs and common law of the state, as to make it impossible to mistake the character and tendency of the system in the details of its legislation, by colonial authority, or the adoption of the statutes or common law of England. It is not conceivable that the Quaker settlers of this province should have introduced those laws of the mother country, which would incapacitate them as individuals, or a religious society, from taking, holding or enjoying property as a matter of right without a charter; or expose to a forfeiture to the proprietor, or mesne landlord, lands conveyed to them for the purposes of sepulture, religious worship, or charity, and above all, that William Penn should have adopted the statutes of Henry VIII. declaring the celebration of divine service according to the rites of the catholic church, to be superstitious, and conveyances for its use illegal and void; and the statutes of mortmain which make the enjoyment of property by a religious body, dependent on the pleasure and permission of the lord of the fee; while at the same time he excludes the statute of the 43 Eliz., and the mild and beneficent principles of the common law which that statute has been held to have restored.

The history of the society of Quakers, presents no instance of an incorporation:—did they adopt any rule of law, making one necessary to give them a legal capacity to purchase property? They have enjoyed it from the earliest time without a license in mortmain—is it liable to be now seized by the state

as forfeited by the purchaser? They have their own modes of worship and system of charities—are donations for their support to be regulated by the prohibitory statutes of a foreign country, or confined to the uses specified in its laws? 2 Ves. Sen. 475. They have kindred societies in other states—do the laws of this invalidate a bequest of money to them for purposes of piety and charity? These are questions which have been made by the counsel in their objections to the devise of the lot of ground to the yearly meeting of Philadelphia, and the pecuniary bequests to the several meetings of friends in this place, and in Maryland, Virginia and Ohio. The objections to the validity of the dispositions of this will, are not founded on any statutory law of Pennsylvania, but on the English statutes of mortmain, superstitious uses, and wills, alleged to be in force in this state by usage, though not adopted by any act of assembly. The principles of the common law have also been relied on, as supporting the objection to the capacity of the parties to take, for the want of an incorporation, as well as of an act of assembly, containing enabling provisions, analogous to the 43 Eliz., validating dispositions for religious, literary and charitable purposes, and giving jurisdiction to the courts to carry them into effect, as they can do in England.

The field of investigation is from its nature a broad one, and from the confined course which has been taken in discussing the law of charities in the various cases which have arisen is, in a great measure, a new one.

Though there are several statutes on the subject in England, prior to the 43 Eliz., no treatise or opinion contains a condensed or comparative view of the system of charities, which has grown out of them, so as to enable us by any authority of precedent, or adjudication, to ascertain the definite source of the various principles, which have from time to time, become embodied into the general course of the law of England. Nor have the courts of the United States, or of this state, brought into contrast or comparison, either the policy of the government of England and this country, in relation to religious establishments and rights of conscience, the general course of legislation pursued in either, or the principles of the common law independent of the statutes alluded to.

Proceeding on the assumption that the 43 Eliz. was the only foundation on which charities could be supported, in opposition to prior statutes, and that statute not being considered in force here unless re-enacted, the courts in this country have laid down principles, which resting solely on such assumption, cannot be considered as authoritative in their conclusions, if on a more thorough examination the premises on which they depend should appear to be erroneous. We trust that a review of the course of their adjudication on charities will show that it has not become so settled as to be sanctioned by the maxim of "*communis error facit jus*," or that in endeavouring to extract the rules which must govern the law of charities from the constitution of the Union and this state, its statutes and usages, and the statutes and common law of England, we violate the respect due to the decisions of courts of high authority.

It is at all times proper to discriminate between the question directly presented for the deliberate consideration of a court, on which they exercise their judgment, by a solemn adjudication; and those observations which are

made by way of illustration, or mere declarations of what the law is, on any particular subject; the one is binding as authority, the other to be respected only as a mere opinion, or argument, which must have its influence, but cannot be enforced on our judgment.

If the supreme judicial tribunal of the state, or the union, have judicially considered the statutes of mortmain to be in force, this court is bound to take the law as settled; but if they have merely declared them to be so, without making such opinion the basis of their judgment, or have, in doing so, omitted to refer to the supreme law of the land, which bears on the question, this court may and ought to do what a higher one would do, notwithstanding any preconceived or expressed opinion—compare the constitution with the statutes, and be governed by the result.

The 3d section of the 3d article of the constitution of the United States prohibits a "forfeiture for treason except during the life of the person attainted;" the constitution of Pennsylvania extends the prohibition to all forfeitures by attainder, or *felo de se*, or death by casualties: it is at least worth the inquiry whether a forfeiture in fee is incurred by an alienation in mortmain; against which, no prohibition is to be found in any law of the state. In a word, whether a penal law of England has an effect, which the whole power of the federal and state government is incompetent to give to a conviction for the highest crimes known to their laws. 9 S. & R. 343.

This inquiry necessarily leads to an investigation of the common law, so as to find out whether these statutes are in affirmance or derogatory of its principles, which have been made the common law of the state so far as adopted or applicable to its policy; if they are of the latter character, then how have they become in force in Pennsylvania, and what is the evidence of their adoption by legislation or usage? As these statutes impose a forfeiture of the whole estate conveyed, the proposition that they are in force here ought to be considered as an affirmative one to be made out by those who assert, that an act lawful by the common law, is prohibited by a statute. The penal laws of England have been presumed not to be in force here; the burden of proof has always been held to be on those who allege a forfeiture, by an act punishable only by statute; and it ought to be clear and conclusive, especially on subjects which affect the rights to the transmission and enjoyment of property.

If there was any one subject on which the founder, the legislature, and the people of the colony, from its first settlement, were governed by a settled, unyielding course of policy, it was to facilitate the transmission of estates, to secure their enjoyment, and disincumber them of all restraints attendant on feudal tenures, the forms of conveyance, the ceremonies of investiture, and most emphatically to protect them from the operation of all laws growing out of an established religion, which at all interfered with the rights of conscience or the perfect freedom of religious worship. *Lyle* v. *Richards*, 9 S. & R. 326, 334, 359.

The charter of privileges of 1701, the colonial laws, both the constitutions of 1776 and 1790, and the laws of the state, are in the same spirit which induced the people, in their first act of assuming independence, and establishing government by their own authority, to prescribe the following oath to the

members of the convention who formed their first constitution:—"That I will oppose any measure that shall or may in the least interfere with or obstruct the religious principle or practice of any of the good people of this province, as heretofore enjoyed." Conv. of Penn. 39. The constitution was in the spirit of this oath, and declared the rights of religious societies and corporate bodies held according to the usage of the colony to be inviolable; we have, therefore, a plain rule of decision by the supreme law of the state, if the nature and extent of such usage can be judicially ascertained.

The enjoyment of real estate in perpetuity, by any body incorporated by a written charter, or one presumed by law from evidence of long possession and exercise of corporate franchises, is *mortmain per se*; if on a review of the legislation and custom of the colony before, and of the state after the revolution, it shall appear, that their rights have been the subject of the most continued favour, and their protection is provided for in the most explicit manner, it must be deemed conclusive evidence of the general policy of the state, at least, if it does not establish the utter incompatibility of any incapacity in any body of men not only to take, but to enjoy an estate to their own use, with the whole scope and tenor both of its written and common law.

The strong constitutional position, which has been assumed by the senior counsel of the respondent in this case, has induced us to examine it with a degree of attention equally called for by the magnitude of the questions involved, and by the conclusions which we have felt ourselves bound to adopt; in some respects at variance with the views of the judges of the supreme court of the United States as to the necessity of an actual incorporation to give the capacity to take; and of those of this state, to enable a corporation to enjoy an estate. We think, however, that it will be found to accord with all the great leading principles and rules which have been too firmly established by themselves to be now shaken, and that their minds would have come to the same conclusion as ours have done, if the same materials for investigation had been presented to them.

In reviewing the judicial history of this state, it is believed that there will be found no decision, that an incorporation is necessary to give to any association of individuals, the capacity of taking and enjoying an estate in perpetuity, either by the assumed name of the society, or by trustees for their use; if such a rule exists, it is only by the common law as adopted here.

Neither is there an adjudged case, turning on the statutes of mortmain, by which any estate has ever been vested in the commonwealth, by a forfeiture incurred in consequence of an alienation to a corporate body, without license, charter or law; or any evidence that such license was ever granted by the proprietary or governor, or any public grant made with a clause of *non obstante statuto*, in any patent, charter or act of assembly, under the colonial or state government; nor does the word mortmain appear on the statute book for one hundred and fifty years from the date of the charter to Penn.

This unbroken silence would have been taken as conclusive evidence that the British statutes were deemed wholly inapplicable to the fixed policy of the colony and state, its usage and fundamental laws, if the contrary opinion had not been expressed by the judges of the supreme court of the state, and adopted by the legislature at the present session. Hence arises the impor-

tance, as well as delicacy, of the questions involved in this cause; to consider them open after the declared opinion of both departments of the government, may seem to indicate a want of respect to their authority, but when we feel convinced that there is a law of higher obligation which must guide our judgment, we are bound to follow it.

The view which we feel constrained to take of the constitutions of 1701, 1776 and 1790, all of which remain in force, so far as respects the rights of property, conscience and religious worship, is this: that all bodies united for religious, charitable or literary purposes, though without a written charter or law, are to be considered as corporations by prescription, or the usage and common law of the state, with all the attributes and incidents of such corporations by the principles of the common law, and entitled to all rights which are conformable to the customs of the province. From this view it results, that if the statutes of mortmain apply to bodies whose charters are in existence, they apply equally to those whose charters are presumed from prescription: a brief summary of these provisions will show that they embrace all corporations of either kind.

The 9 Hen. III. ch. 36, declared gifts made to any religious house to be void, and that the land given should enure to the lord of the fee: the 7 Edw. I. prohibited all alienations in mortmain under a like forfeiture. These statutes were evaded by fictitious recoveries, till the 13 Edw. I. took away their effect: a new mode of evasion was then invented by conveyances in trust for uses in mortmain, so that the profits went to religious persons; the 15 Rich. II. extended the former statutes to such uses, and to all guilds, fraternities, towns, and cities which have perpetual community, and all others which have offices perpetual, though not people of religion. Keb. St. 5, 33, 46, 181; 1 Ruff. St. 9, 32, 100, 401, 2.

The 23 Hen. VIII. ch. 10, prohibited conveyances to any bodies not incorporated, for the use of churches, &c., to have *obits* perpetual or the continual service of a priest for ever, and declared them void, but there was an express saving of the right of devising in mortmain by the custom of cities and towns corporate. Keb. St. 403, 404; 2 Ruff. St. 171, 172.

The statute of wills of 34 and 35 Hen. VIII. contained an express exception of devises to corporations. Keb. St. 562; Ruff. 333, 4.

Such is the substance of the English statutes, which have been considered as the clogs upon dispositions, to pious and charitable uses, which have been removed by the 43 Eliz. in England: if the question of their application to the state of things in this colony was a new one, we should deem it apparent that they were never practically extended to it. "It is the true principle of colonization that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other." 3 Binn. 596.

That the law of charities as it rests on the 43 Eliz. is not only useful, but peculiarly adapted to the policy of the state is unquestioned; it is therefore difficult to account for the prevalence of the opinion that it is not in force, or that any statutes repugnant to its provisions, should have been considered as practically adopted: yet such is undoubtedly the apparent tendency of judicial opinion for the last twenty-five years.

In 1808, the judges of the supreme court, made a report to the legislature

pursuant to a resolution calling on them to state, what English statutes were in force, in which they declare "conveyances to superstitious uses absolutely void by these statutes, and conveyances to corporations unless sanctioned by charter or act of assembly, to be so far void that they have no capacity to hold the estates for their own benefit, but subject to the right of the commonwealth, who may appropriate them at their own pleasure; in other words that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain." They consider them as standing on the same footing as conveyances to aliens. 3 Binn. 626; *Leazure* v. *Hillegas*, 7 S. & R. 319, 22.

In *M'Girr* v. *Aaron*, they declared a devise to an officiating priest, and his successors not being a corporation sole, was against the policy of the law, and void as tending to a perpetuity. 1 Penn. Rep. 51. In the case of the *Methodist Church* v. *Remington*, they say—"The statutes of mortmain, too, which deprive corporations of the capacity to hold," &c., and consider the legislature as evincing "an evident jealousy of clerical monopoly," though they refer to no act in which it had been expressed. They also decided, that a conveyance for a religious society composed of members, a majority of whom resided out of the state, was not good under the law of 1730; and that the trust not being sanctioned by any legislative recognition, they would not lend their aid to carry it into effect. In *Witman* v. *Lex*, they seem to take for granted, that at common law an incorporation was necessary to give a capacity to take and hold in perpetuity, 17 S. & R. 91; though it was dispensed with by the custom of the province. We should have felt bound by these opinions, if the court had taken a view of the constitution and legislation of the state on the subjects to which they relate, and given them a deliberate construction; but as they have not been called upon to declare the meaning of any, but the act of 1730, or of the provisions of any of the constitutions, it cannot be expected, that the law can be considered as settled until their provisions had been brought under judicial notice.

In the case of the *Baptist Association* v. *Hart's Executors*, the supreme court of the United States have decided that a bequest of personal property to the plaintiffs as trustees was not valid for want of an incorporation, at the time of the devise, 4 Wheat. 28; and the decision was approved in the case of *Inglis* v. *The Trustees of the Sailor's Snug Harbour*, 3 Pet. 114. This case was ruled according to the law of Virginia, in which state the 43 Eliz. had been repealed; we may therefore consider it as a case settling a question of a local, rather than of a general nature; it has not at any rate such an application to the law of Pennsylvania, as to control this case, if it should appear to be embraced in the provisions of any act of assembly or constitution of the state or to rest on its known and recognised usage.

So far as these opinions of both courts rest on general principles affecting this case, they are also open to all rules which have been laid down in other cases by the same authority, to which it is thought best to refer, before entering on a review of the general course of the law of England or of this state.

The last case which has arisen in the supreme court of the state, is the *Methodist Church* v. *Remington*. In giving their opinion, the chief justice uses

this strong language, "The decision in *Witman* v. *Lex*, is full to the point, that a trust in favour of an incorporated religious or charitable society, is an available one." As the statute 15 Rich. II. expressly applied to conveyances in trust, or for the use of religious persons, in mortmain, we may consider this statute as not in force in this state; so that the objections growing out of the statutes of mortmain, will be confined to those of Hen. III. and Edw. I. In relation to superstitious uses, the court observe,—"The present is not a superstitious use, and indeed it is not easy to see how there can be such a thing here, at least in the acceptation of the word by the British courts, who seem to have extended it to all uses which are not subordinate to the interest and will of the established church;" so that an inquiry into this subject is not closed. In *M'Girr* v. *Aaron*, there were no trustees, and though the court held the devise to an officiating priest void, because he was not a corporation; yet they declared it good in case of the congregation, though not incorporated, (1 Penn. Rep. 51, 52,) on the principle, that "a gift to a charitable use shall not fail for want of a trustee, but vest as soon as the charity has acquired a capacity to take." As the bequest in the case of the baptist association failed only for the want of a trustee capable at the time of the devise, though there was an incorporation afterwards, we cannot consider it as authority in this state, where a different principle is established—the bequest would have been good according to *M'Girr* v. *Aaron*.

In examining the decisions of the supreme court of the United States, which precede and follow the baptist case, it appears, that they have established a different principle as to devises of real estate for charitable uses, or for the use of religious societies which are not incorporated; so as to leave that case applicable only to a bequest of money or personal property, even in Virginia. In *Terrett* v. *Taylor*, land in or near Alexandria, was conveyed to two persons, and the church-wardens of the parish for the time being, and their successors in office, for the use and benefit of the church in said parish; the deed was held to operate by way of estoppel, to confirm to the church and its privies, the perpetual and beneficial estate in the land, though it was not incorporated, and church-wardens were not capable of holding an inheritance in land by succession; 9 Cranch 43, 53; 9 Wheat. 455, 464. The court remark, "And in our judgment, it would make no difference, whether the episcopal church were a voluntary society, or clothed with corporate powers, for in equity as to objects which the laws cannot but recognise as useful and meritorious, the same reason would exist for relief in the one case as the other. Laws enacted for religious purposes, evidently presuppose the existence of the episcopal church, with its general rights and authorities growing out of the common law;" the church was capable of receiving endowments of land, and that the minister of the parish was during the incumbency, seized of the freehold of its inheritable property, as emphatically *persona ecclesiæ*, and capable as a sole corporation of transmitting the inheritance to his successors; 9 Cranch 45, 46, 329; 9 Wheat. 455, 464. In *Clark* v. *The Town of Paulet*, they say, "The property was in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents, 9 Cranch 49, or representatives entitled to take the donation, 9 Cranch

329." "The true legal notion of a parish church, is a consecrated place, having attached to it the right of burial, and the administration of the sacraments. Every such church, of common right, ought to have manse and glebe, as a suitable endowment, and when there is a church actually in existence, a grant to it is in effect a grant to the parson and his successors, as an endowment to be held *jure ecclesiæ*." 9 Cranch 329; 9 Wheat. 464. The parson has a qualified fee, but the land becomes the perpetual inheritance of the church. 9 Cranch 47, 53, 329; Co. Lit. 341 a. b.; 2 Mass. Rep. 500.

In *Beatty* v. *Kurtz*, the court decided that the laying out and marking a lot in the plan of a town, "for the Lutheran church," was a good and valid disposition—though it was not then organized, and was never incorporated as a religious society, but was a voluntary association, acting in its general arrangement, by committees and trustees chosen from time to time; or any church actually in existence, or any grantee capable of taking. It was supported as a dedication of the lot to public and pious uses, and the enjoyment decreed to the committee of the society. 2 Pet. 580, 81, 83, 85. The court take a ground which applies with great force to the law and constitution of Pennsylvania, as will appear hereafter.

"The bill of rights of Maryland gives validity to any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting or other house of worship, and for a burying-ground, which shall be used, improved and enjoyed, only for such purposes. To this extent it recognises the doctrines of the statute of Eliz. for charitable uses, under which, it is well known, that such uses would be upheld, although there was no specific trustee or grantee." In the case of the town of Paulet, they laid down the principle, that they considered appropriations or dedications of property to particular or religious uses as an exception to the general rule, requiring a particular grantee, and like the dedication of a highway to the public. 9 Cranch 331; S. P. 2 Pet. 583. In *M'Connell* v. *Lexington*, they considered that the immemorial use of a spring, by the people of the town, as public property, was evidence of its original dedication, and decisive against a private claim to its exclusive use. 12 Wheat. 582. In *Cincinnati* v. *White*, the principle of these cases was affirmed to its fullest extent, and the court add what is very important in the consideration of this case—that "the case of *Beatty* v. *Kurtz* did not turn on the bill of rights of Maryland or the statute of Eliz., but rested on more general principles of law." 6 Pet. 436, 7.

To trace these principles to their source in the early statutes and common law of England, is therefore in perfect accordance with the decisions of the tribunal to whose revision our opinion is subject; it is the more necessary in this case, as the general course of the law of England, as to the transmission and enjoyment of property, formed the law of the colony at its first settlement, and continued in force till repealed or altered by colonial authority. In ascertaining what these general principles are, it is our duty to adopt the rules of construction which have been established by the supreme court, in relation to charities, under the 43 Eliz., and to apply them to the laws and constitution of this state, and the other English statutes, which are analogous in their provisions and subject matter to that statute, in doing which we shall start upon premises which must lead to correct results.

[Magill v. Brown.]

The legislation of Pennsylvania will be first considered according to the rules of expounding statutes laid down in the *Baptist Association* v. *Hart*, and those which are the principles of the common law.

It is not to be denied, that if any gifts are enumerated in this statute which were not previously valid, or for which no previous remedy existed, the statute makes them valid and furnishes a remedy. That there were such gifts, and that the statute has given them validity, has been repeatedly determined: the books are full of cases where conveyances to charitable uses which were void by the statutes of mortmain, or were in other respects so defective, that on general principles nothing passed, have been sustained under this statute. If this statute restores to its original capacity a conveyance rendered void by an act of the legislature, it will, of course, operate with equal effect on any legal objection to the gift which originates in any other manner, and which a statute can remove. The authorities to this point are numerous: 4 Wheat. 31; 1 Sugd. Pow. 267; 4 Vin. Abr. 479, 483; Gilb. Rep. 45; 1 P. Wms. 248; 3 Pet. 141; 4 Ch. Rep. 40.

"Statutes providing remedy for the maintenance of religion, the advancement of learning, and the relief of the poor, shall be extended according to equity, right and reason in their favour, and never against them," or be so construed as to permit the mischief to remain and suppress the remedy—the duty of judges is to advance the remedy and suppress the mischief—to advance the public and suppress the private object. 11 Co. Rep. 70 to 73 b.; Hob. 97, 157; 5 Co. Rep. 14 b. Statutes authorizing gifts in mortmain, and all laws in favour of public institutions, shall be favourably and benignly construed. 11 Co. Rep. 76 a.; Hob. 122; Co. Litt. 99 a.; 9 Cranch 331; 3 Pet. 140, 480; 1 Lev. 66; Dyer 225. So of charters of the king for pious and charitable works; 10 Co. Rep. 28 a. And in all acts for the confirmation of grants by persons having power over the land, the deed shall be established though it wants some circumstance necessary to give it effect, according to its tenor and purport. 11 Co. Rep. 78 a.

The statutes of superstition were intended to advance and continue good and charitable uses, and affect none which are not derived out of superstitious uses, or to be distributed by superstitious persons. Moore 129, pl. 277; 4 Co. Rep. 105, 11, 13, 14; where the same deed contains a disposition partly superstitious, and pious and charitable in other parts, the latter are good, if not dependent on, and capable of being separated from the former. 4 Co. Rep. 104 to 116, and cases cited; Anders. 95 to 100; Cro. Eliz. 449; Wing. Max. 497; Co. Litt. 342 a. Though hospitals are named in the statutes, they apply only to such as are religious or ecclesiastical, or the funds are to be devoted to purposes of superstition as specially defined and plainly prohibited: it shall not be made superstitious by construction or intendment—it must be plain and not imaginary, and no general words shall take away good and charitable gifts allowed by parliament, which are favoured in the law. Co. Litt. 342 a.; Hob. 120–4; Moore 865, pl. 1194; 11 Co. Rep. 70 b., 71 a.; Wing. Max. 497. An affirmative statute does not take away a right existing by common law or custom, as the statute of wills, which did not affect the previous right to devise. Co. Litt. 111 b., 115 a.; 3 Co. Rep. 35 a.

A custom saved and preserved by a statute is good against a statute: thus lands can be held in mortmain in London without license, because there is

such a custom; Croke Eliz. 455, and the customs of London are saved by acts of parliament and Magna Charta. 2 Co. Inst. 201; 4 Co. Inst. 250, 3; 5 Day's Com. Dig. 20; Croke Eliz. 248, 455; W. Jones, 251, 387. A statute authorizing an act to be done, repeals a law prohibiting it; otherwise it would be a dead letter, in opposition to an established maxim that such construction shall be made of all acts, *ut res magis valeat, quam pereat*, and reverse another unquestioned one, *leges posteriores priores contraria abrogant*. 6 Pet. 299. A grant by the king or an act of parliament, is an authority to hold the thing granted, and operates as a license dispensing with the performance of any other act required by any law against which the king may grant a license or dispensation; though none is given in terms, it *per se* creates an incorporation, confers succession, and grants a rent; so if done by a private person under the authority of an act of parliament, as the erection of an hospital. 10 Co. Rep. 30, 25 a.; Plowd. 502. A clause of *non obstante statuto*, is not necessary to save a forfeiture by the statutes of mortmain; it is inferred from the act of the king or the legislature in order to give it effect; 8 Co. Rep. 56: its only use is to show the king is not deceived; 4 Co. Rep. 36 a. Hence, it has always been held that the statutes did not apply to grants made by the king. 15 Vin. Abr. 479, A. 2. "He shall not be intended to be misconusant, and when he licenses expressly to alien to an abbot, &c., which is in mortmain, he need not make any *non obstante* of the statute of mortmain, for it is apparent to be granted in mortmain," the license of the king or mediate lords "operates to two intents, as a dispensation from the statute of *quia emptores*, and of mortmain, because their deeds shall be taken most strongly against them, and the king shall not be presumed to make a void grant." Co. Litt. 98 b., 99 a.; Plowd. 502; 8 Co. Rep. 56.

Where land is held immediately of the king, he may grant a license to alien in mortmain; if held mediately, it might be made by the mesne lord or with his consent; 34 Ed. I., ch. 3, Keb. St. 71; Ruff. St. 155. Since the 7 & 8 Will. III. he can do it without their consent. 2 Day's Com. Dig. 298. As tenures in chivalry had been abolished by the statute 12 Car. II. the forfeiture accruing by alienation in mortmain, accrued only to the king, who may renounce by his license a right conferred on the crown. Co. Litt. 98, 99; Vaugh. 332.

The effect of a license in mortmain is not to give a capacity to a corporation to take or hold in mortmain. Conveyances in mortmain were good at common law. Co. Litt. 98–9; Vaugh. 356. A grant in frankalmoigne placed the lands in the hands of bodies which never died; the estate became dead as to the king, or mesne lords of whom they were holden; yielding neither escheats, wardships, reliefs or other benefits; such grants were always good by deeds of private persons before the statutes, or by title of prescription, and are now good by the grant of the king. Litt. § 141, 2; Co. Litt. 98, 9; Co. Litt. 2 b.; Terms of the Law, 294; Plowd. 293; 6 Co. Rep. 17 a. Notwithstanding the statutes, the estate vests by the conveyance, 7 S. & R. 320; they are founded on the capacity of the grantee to take, so that wherever they apply the conveyance would enable a corporation to hold at common law for its own use; for if the estate did not vest, it would remain in the hands of the grantor or his heirs, as in the case of a conveyance to super-

stitious uses, which are merely void without incurring any forfeiture, by the statutes of Hen. VIII. and Ed. VI.

The license therefore is only an exemption from the penalty of the statutes, Co. Litt. 52 b.; it restores an interest; 1 Freem. 117. It is an authority coupled with an interest, enabling the grantees to acquire and enjoy an inheritance to their own use, without incurring the forfeiture, and by a renunciation of the rights given by the statutes, leaves the estate in their hands as if they had never been passed. 2 Day's Com. Dig. 297, b. 3; F. N. B. 222, 495, 500; 4 Co. Inst. 135; Co. Litt. 99 a.; Vaugh. 333, 356; and operates in favour of a society or body not incorporated by a charter, Vaugh. 351, 2; 7 Co. Rep. 35 b.; which is conclusive to show its previous capacity to take. All that can be required then, to give the same capacity to hold as to take, and make the right to enjoy as perfect as to take an estate, is any act of the party to whom the forfeiture accrues, which is in terms, or by its legal operation, a renunciation of a right conferred by law, which binds him and protects the estate from the assertion of his claim under the statutes; according to the established principle, that subsequent laws abrogate prior ones inconsistent with them, without any repealing clause, and will produce the same effect as a license in mortmain.

It is admitted that the king is bound by all acts of parliament in which he is named, so that he can exercise no power by statute, prerogative or tenure, in derogation of any right protected, or authority conferred by the statute: but, generally speaking, he is not bound unless its provisions extend to him, subject to these exceptions; all statutes which provide profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor, 11 Co. Rep. 71 b.; 5 Co. Rep. 14 a. b.; which suppress wrong and provide a remedy for a right, 2 Co. Inst. 142, 69, 359, 681; or tend to perform the will of a donor or founder, 11 Co. Rep. 72 a.; 5 Co. Rep. 14, 15; Plowd. 246; 3 Atk. 147, bind the king though not named. His claims to lands by escheat, forfeiture or wardship, are subject to all rights existing before they came to his hands; the law gives him a better remedy, but no better right, than the subject from whom the land came to his hands, 2 Co. Inst. 573; 2 Ves. Sen. 296, 7; Hardr. 69, 469; and the appropriate courts were authorized by the statute 33 Hen. VIII. ch. 39; Keb. St. 555; 2 Ruff. St. 324, to decide on the rights of a subject, in a controversy between him and the king, according to equity and good conscience, as between subject and subject; 7 Co. Rep. 19 b.; Hardr. 27, 176, 230, 502; 4 Co. Inst. 190.

These are the principles which have given to the 43 Eliz. its powerful effect; though it contains no repealing clause, license or *non obstante statuto*, yet, by universal consent, it has been held to repeal the statutes of mortmain, the exception of corporations in the statute of wills, and to restore the common law in all cases embraced in its provisions, or which can be brought within them by the most liberal and benign construction. 1 P. Wms. 248; Pr. Ch. 16; Gilb. Eq. 137; 2 Eq. Cas. Abr. 191; 3 Pet. 141.

These principles are admirably condensed by the supreme court in 4 Wheat. 31, and are those by which we must consider the legislation of Pennsylvania on the same subjects; we must hold its law to bind the state, and to dispense with the forfeiture accruing to it by an alienation in mortmain, if a similar law in England would bind the king. The prerogative of a repub-

lican state cannot be deemed, in a court of justice, more sacred than the jewels of a crown; or the rights of its citizens, individually or collectively, to the enjoyment of property, to be placed on a less permanent foundation than those of the subjects of a monarchy; nor can corporations be subject to disabilities here from which they are exempted by the general course of the law of England, between the spirit and policy of which, and that of Pennsylvania, there will be found a most marked difference in this respect.

In England, there has always been a jealousy of their rights to hold property; here, they will be found to have been favoured and protected by express provisions in the constitution and laws, while there is an entire absence of any restriction on their capacity to take or enjoy estates; there, the effect of statutes has been to remove disabilities interposed by former statutes, which abrogated common law rights; here, laws have been passed in affirmance of its principles, and they have been embodied in a supreme law. There, courts have gone to the extent of their power, to rescue charities from the intolerant spirit of the times; here, their duty is to further the benevolent policy of the people and legislature as evidenced in all their acts.

From the first settlement of the province, we find that the uniform tenor of its laws has been, to encourage all alienations of property, and to confirm its disposition, in every mode known to the law. The act of 1705 confirmed all sales of land made under the laws of the province, and declared that no deed, grant or assurance should be held defective on account of any want of form, of livery of seisin, attornment, misnomer or misrecital, but shall be good and effectual. 1 Dall. Laws, 51, 3; 1 Smith, 31. This law has always been in force. The act of 1711, confirmed all grants from the proprietor to any person or persons, bodies politic or corporate, to hold the same for such estates and uses as they had been sold or disposed of, notwithstanding any defects therein, and shall be expounded most beneficially for the grantees, according to the words, tenor and true meaning thereof. 1 Dall. App. 39, 40. This law was repealed in council in 1713, but its principles have ever been respected. The law of 1705 declared, that all wills whereby any lands were devised, should be good and available in law for granting, conveying, and assuring the lands devised and chattels bequeathed. 1 Dall. 53; 1 Smith 33; 1 Dall. App. 26, 36. The law of 1742 gives a remedy for the recovery "of any legacy or bequest of any sum of money" to any person or persons. Miller's Laws, 156; 1 Dall. 449, 631. Neither of these laws contain any exception of corporations.

The rights of conscience were declared inviolable by the charter of privileges of 1701, granted by William Penn to the people of the colony: no person who lived quietly under the government and acknowledged one God, should be in any case molested, or prejudiced in his estate, because of his conscientious persuasion; 1 Dall. App. 8, 10; and liberty of conscience was secured by a law approved in council. 1 Dall. 43, 4. In 1712, an act was passed empowering all religious societies of protestants within the province, to purchase and hold lands for burying grounds, houses of worship, schools and hospitals; and, by trustees or otherwise, as they shall think fit, to receive and take grants and conveyances for the same, for any estate whatever for the uses aforesaid. All sales, gifts or grants to such societies, or any persons in trust for them, were ratified and confirmed according to their

tenor and meaning, and of the parties concerned. Gifts to the poor of these societies, or for their use, shall be employed only for the charitable uses for which they were given, according to what may be collected to be the true meaning of the donors or grantors, notwithstanding any failure in these gifts, grants or bequests. Bradford's Laws, 160. This law was repealed in council, twice enacted, and as often repealed. In 1710, the judges of the county court were made a court of equity, authorized to proceed according to the rules and practice of the high court of chancery of Great Britain, and an appeal was given to the supreme court, with power to decree as may be agreeable to equity and justice; Bradf. Laws, 103, 120. Though this law was repealed in 1713, and courts of chancery discontinued in 1736, the rules and principles of equity have always formed part of the common law of the state.

The sixth article of the charter to Penn provided, that the laws for regulating and governing property within the province, as well as for the descent and enjoyment of lands and goods and chattels, should be and continue the same as they should be for the time being, by the general course of the law of England, till the same should be altered. 1 Dall. App. 3. The preamble to the act of 1718 recites, that it is a settled point, that as the common law is the birth-right of English subjects, so it ought to be the rule in British colonies. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts; 1 Dall. Laws, 129, 133; or, as has often been declared by the supreme court of the state, unless they are convenient, adapted to the circumstances of the colony, or have been in force by adoption, usage or long-continued practice, in courts of justice. 1 Dall. Rep. 67, 74; 3 Binn. 596–7; 1 Dall. Laws, 722.

After repeated attempts to pass a law in favour of religious societies which would accord with the spirit of the colony, one was finally approved in council. The act of 1730–1 confirmed all sales, gifts and grants of land to any persons in trust for the use of any protestant religious society, for sites of churches, houses of religious worship, schools, almshouses and burying-grounds, made before the law; it also contained a provision which made it lawful in future, for any such society within the province to purchase, take, receive by gift, grant or otherwise, for the above specified uses and purposes, and for any estate whatsoever, and to hold the same for the said uses in fee, provided, that they should not take land for their maintenance or support, or for any other uses than those specified. 1 Dall. Laws, 270–3.

The constitution of 1776 declared, in the first section of the bill of rights, "That all men have an equal right to acquire, possess and protect property;" and in the eighth, "That every member of society hath a right to be protected in the enjoyment of life, liberty and property." 2. "That all men have a natural and unalienable right to worship God according to the dictates of their own conscience and understanding." 3. "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of his civil rights as a citizen, on account of his religious sentiments, or peculiar mode of religious worship, and that no authority is or ought to be vested in any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience in the free exercise of religious worship."

In the frame of government, § 45, "And all religious societies or bodies of

men, heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed under the laws or former constitution of the state." § 46. "The declaration of rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretence whatever." 1 Dall. App. 55, 60; Convention of Pennsylvania, 55, 64.

The first law passed, on the change of government, declared the province laws in force till altered or repealed; also the common law, and such parts of the statute laws of England as had been before in force,—"And so much of any law or act of assembly as declares, orders, directs or commands any matter or thing repugnant to, or inconsistent with, the constitution, is hereby declared not to be revived, but shall be null and void, and of no force or effect." 1 Dall. Laws, 722.

The constitution of 1790, in art. 7, § 1, provides, "That the legislature shall, as soon as may be, provide by law for the establishment of schools throughout the state, in such manner that the poor may be taught gratis." § 2. "The arts and sciences shall be promoted in one or more seminaries of learning." The 44th section of the old constitution contained similar provisions, though not so full. § 3. "The rights, privileges, immunities and estates of religious societies and bodies corporate, shall remain as if the constitution of the state had not been altered or amended." The first three sections of the bill of rights are, in substance, the same as in the old one. The third concludes—"and that no preference shall ever be given by law to any religious establishment or modes of worship." § 26. "To guard against the transgression of the high powers which we have delegated, we declare that every thing in this article is excepted out of the several powers of government, and shall for ever remain inviolate." In the first clause of the schedule it is ordained, "That all laws of this commonwealth in force at the time of making the said alterations and amendments in the said constitution, and not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies politic, shall continue as if the said alterations and amendments had not been made." 3 Dall. Laws, 32, 36. These provisions, and the law which immediately followed the adoption of the constitution, are a direct negative on the existence of any spirit of policy adverse to corporations.

In 1791, an act was passed "to confer on certain associations of the citizens of this commonwealth, the powers and immunities of corporations, or bodies politic in law." The preamble recites the reasons to be, the saving time to the legislature in enacting laws to incorporate private associations, and the convenience of individuals desirous of incorporation—and the law provides: "That when any number of persons, citizens of the state, are associated, or mean to associate for any literary, charitable or religious purpose, they are empowered to obtain a charter of incorporation, subject only to the following conditions. To state in writing the objects, articles and conditions of their association, and if the attorney general and the supreme court shall certify their opinion that they are lawful, the governor shall order

it to be enrolled; and the persons associated become an incorporated body in law and in fact; to have continuance by their corporate name and title. They are authorized to execute the usual corporate powers, and to make by-laws and ordinances, provided they are not repugnant to the constitution and laws of the United States, of this state, or to the instrument on which the corporation was established. The corporation and their successors shall be able and capable in law, according to the terms and conditions of the instrument on which they were established, to take and hold lands, money, goods and chattels given them, according to the articles and by-laws, or the will of the donor, provided the clear income does not exceed five hundred pounds yearly." "And, whereas, bequests and legacies may be made to public institutions of which they may not derive the benefit intended, from a want of information," it is directed, that "when a will is brought to the register's office, to be recorded, which shall contain a bequest or legacy to a public incorporate body, he shall give them notice within six months, of the nature and amount of the legacy, and the name of the executor." 3 Dall. 40, 43.

The law of 1818 enacts, that where any lands are holden in trust for any religious society, or for any number of persons for the purpose of public worship or schools, or to be used as a burying-ground, or for charitable purposes; or where any estate of a personal nature, is or may be vested in any person or persons, to be applied by them to any religious, literary or charitable use or uses, and the trustee or trustees neglect or abuse such trust or trusts, the supreme court, or court of common pleas, on complaint made, may call on the trustees to answer; and if, on hearing, the court are satisfied that the trust has been neglected or abused, may and shall remove the trustees, and appoint others in their place, who shall be vested with the rights and powers of the former trustees, and give such security as is required. § 2. The court shall have the power and jurisdiction of compelling the trustees to account before the court or auditors. Purd. 167; 7 Smith 43–4.

This law was followed by the act of 1825, "To prevent the failure of trusts." The supreme court is authorized to grant relief in equity in all cases of trusts, so far as regards the appointment of trustees, either in consequence of the death, infancy, lunacy or other inability, or where a trustee renounces or refuses to act, or one or more dies, or becomes *non compos*, and a joint action is requisite, and to compel a conveyance of the legal estate, when the trust has expired. On the application of any person interested in the execution of the trust, the court may appoint a trustee, having regard to the objects of the trust as fully as a court of equity can do, and the rights of the former trustee shall vest in him; on the application of trustees, the court may remove them and appoint others. The act of 1828 confers the same powers on the courts of common pleas, district and circuit courts. Purd. 858–60.

From this summary of the legislation of Pennsylvania, it appears to have partaken of the spirit of its successive constitutions, and to have been constantly progressive, in the completion and perfection of the great system of its founder, each succeeding law being more liberal in its principles, and more expanded in its provisions. The principles of the charter of Penn continued in force and protected all religious societies in the enjoyment of their

rights of worship and property, in their houses of devotion, after the repeal of the act of 1712 by the council, and the passage of the act of 1730, as before.

In 1733–4, Governor Gordon informed the council that a house had been erected in Walnut street for the exercise of the Roman Catholic religion, in which mass was openly celebrated, contrary to the laws of England, particularly to the statute of 12 Will. III., which extended to the colonies. The council were of a different opinion, and declared that the catholics were protected by the charter of privileges and the law concerning liberty of conscience; but they referred the subject to the governor, that he might consult his superiors at home. No other proceedings however took place. Gord. 216. This opinion of the council accords with the declaration of William Penn to the members of the assembly, in 1701, "That he had justly given privileges the precedency of property as the bulwark to secure the other;" 2 Clarkson's Life of Penn, 203: it was a rule of property, and the basis of the usage and common law of the state; the opinion of the council was the practical exposition of the charter, as understood and acknowledged, of which there cannot be a stronger case than the one that occurred. The 11 & 12 Will. III., ch. 4, prohibited the celebration of mass in any of the dominions of England, under a penalty of perpetual imprisonment. 4 Ruff. St. 41. If this statute included the colonies, it was repealed by the charter; if it did not, there was no law professing or attempting to interfere with it as a fundamental law of the colony.

The list of laws rejected by the king in council, shows the constant struggle between the policy of the colony and mother country; Hall and Sellers' L. 21, 57, 67, 99, 125, 193, 199, 276; Miller's L. 16, 74, 158; which ended only with the revolution. The usage continued, in despite of the efforts of the king and council to prevent it from having the sanction of a law, and the provisions of the constitution were as broad as the usage: its phraseology is adapted to the inconveniences which existed, and its provisions afford a remedy commensurate with the mischief arising from the want of a legal sanction to rights indispensable to the enjoyment of practical liberty of conscience, as a bulwark to property.

In the case of the Cedar Spring congregation, the trust did not depend on the enabling provisions of the statute, but on the custom of the province, as stated in *Witman* v. *Lex*; *Methodist Church* v. *Remington*; 6 Binn. 59, &c. The evidence of this custom appears in all the acts for granting charters, and in the law of 1791, in relation to the lots held by the quaker societies in Front street, and at the corner of Fourth and Arch streets. 3 Dall. L. 46–7. The proceeding before the council in 1734, is unequivocal evidence of the claim of right by the catholic societies, according to the usage under the charter of 1701; so that we have from the most authentic sources, full evidence of the existence of a custom and usage, expressly saved and preserved by the constitution of 1776, which operates not only prospectively, but refers by express terms to the former constitution of 1701, so as to make the usage of the same force from that time, as it would have had, if the state had been then independent of the mother country, as she was in 1776. Being saved by the supreme law, the custom had the same force as the law itself, and stood on the same basis as customs saved by Magna Charta, according to the rules of law before laid down.

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The constitution of 1776, then, puts the rights which could be enjoyed by the previous custom of the province, on the same footing as if they had been defined in detail in the 45th section, and the present constitution makes them perpetual. If any additional sanction could be given to them by human authority, it will be found in the first amendment to the constitution of the United States. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This extends to the judicial as well as legislative departments of the government, and annuls all jurisdiction over the subject matter, past or future; 1 Cranch 174–9; 3 Dall. 382. If the rights of a religious or literary society are derived from a contract or grant, no state law can impair their obligation, and the supreme court have placed them under the same constitutional protection as those of individuals; 9 Cranch 45; 9 Wheat. 454; 8 Wheat. 480; 4 Wheat. 624.

To deny to bodies united without a charter, any rights of property which could be enjoyed by a corporate body, would be in direct opposition to both the constitutions of the state and union, and the custom of the province. "Incorporations were almost unknown; yet to all sorts of pious and charitable associations, in every part of the province, valuable bequests were made by those who were ignorant of the niceties of expression necessary to accomplish the object at common law. Nothing was more frequent than bequests to unincorporated congregations, without the intervention of trustees; and even when there was a corporation, it frequently happened that the corporate designation was mistaken, or the trust vaguely defined. Notwithstanding which, the testator's bounty was uniformly applied to the object." Surely a usage of such early origin and extensive application, may claim the sanction of a law, resting, as it does on the basis of all our laws of domestic origin, the legislation of common consent. 17 S. & R. 91–2.

The same principle is adopted in all governments; a usage or custom is presumed to have had its origin in a law once in existence, and lost in the lapse of time, the evidence whereof being by prescription, that supplies the place of the written law, which is taken to have been as broad as the usage. The law presumed from a custom, has the same force as one appearing on the rolls of Parliament—the only difference is in the mode of proof; and the rule that a custom shall not prevail against an act of parliament, unless it is saved and preserved by a statute; 3 Dow Parl. Cas. 112; Anstruther, 614; 1 Dow Parl. Cas. 322. The supreme law of England and the states of this union, which have no written constitutions of government, is proved only by legislative usage, which is the evidence of their constitution and supreme law; 3 Dall. 400; 2 Pet. 656–7; 6 Pet. 714–15. On whatever subject a known and recognised usage exists, it forms the law of the case, and controls all affirmative statutes, and the rules of the common law—as a general or local law, according to its nature; 6 Pet. 715, and cases cited; the reason is obvious—it is founded on a law presumed from the prescription. This presumption is not, that such a law ever, in fact, existed, but "it is adopted as a general principle, to take the place of individual or specific belief;" 12 Ves. 265–6; 10 Johns. Rep. 380; 6 Wheat. 504.

Though the party claiming by prescription produces his title, and it is worth nothing, the court will direct the jury to presume another grant subse-

quently; all shall be presumed to be done, which shall make the ancient appropriation good, and the right shall be presumed from the prescription, if it could have had a legal beginning; 12 Co. Rep. 5; Cowp. 109, 110; the same rule applies to the franchises of a corporation; 4 Mod. 55; 1 Saund. 345; 1 Roll. Abr. 512; "for whatever may commence by grant, is good by prescription." Where possession has been long held under a claim of right, to the exclusive enjoyment of the lands of the crown, a patent, charter, or grant of the king will be presumed; 1 Dow P. C. 322; the same rule is applied in this country, (14 Mass. 534,) though the possession was taken and held under a defective title; 4 Pet. 506, 507; 5 Pet. 439, 440. The principle has been applied in Pennsylvania to a religious society, which had been long in possession of a piece of ground, on which they had erected a church, used it for public worship, and occupied an adjoining piece for a burial ground, and another piece for the free passage of the congregation, and the accommodation of horses and carriages, according to what the supreme court declared the common usage. This possession was held to be sufficient to enable the society "to recover in ejectment, and sufficient for a presumption, that the commonwealth had granted the land to the predecessors of the plaintiffs, or made a promise of a grant which would establish a right of pre-emption;" *Mather* v. *The Ministers of the Trinity Church and others*, 3 S. & R. 510, 511.

Either presumption is sufficient for all the purposes of this case; the only difference between a grant and a pre-emption is, the payment of the purchase money, which must precede the formal consummation by patent; but when paid, the right to a patent, and the enjoyment of the estate against the commonwealth, is complete. We may now assume these principles to be settled, that usage and customs have the force of laws—that those which are saved and preserved by the constitution of this state, are its supreme law—and that rights declared in the constitution, or which have been, or could be enjoyed according to customs or usage, saved and preserved, neither depend on legislative discretion, nor can be impaired, much less forfeited, by legislative power. It follows, that no charter can be requisite to give a capacity already existing by usage, or asserted in the bill of rights or constitution, or a dispensation from a forfeiture, which no law was competent to enforce or prescribe. Hence, the course of the legislature has been, in granting special acts of incorporation to religious, literary and charitable societies, strictly in the spirit of the constitution, to superadd to their constitutional rights, the privileges, franchises and immunities of corporations, to confer the powers of corporate bodies, "to further their objects and charitable designs," to put all religious societies on the same footing, as to the encouragement and protection afforded by the constitution; Bradf. L. 11, 23, 52, 89; Laws of 1790, p. 285; by imparting to them such powers, as would enable them to manage their corporate concerns, and enjoy their corporate property by their own by-laws and officers, and to assert their rights in their corporate capacity; not to give the capacity to take property, nor to release it from the forfeiture of mortmain. Charters were given to catholic societies, "to enable them to manage the temporalities of the church, as fully as any other religious society could do;" Laws of 1789, pp. 456, 532; 9 Cranch 49, 326–7. A lottery was granted for the benefit of the Hebrew congregation, in order to save their property from sale by exe-

cution,—the preamble contained this recital—"And whereas, it is just and proper that all religious societies should be protected, so far as is consistent with the principles of the constitution;" Laws of 1790, p. 310; 2 Dall. L. 817.

In most of the laws granting charters, there is a recital to this effect, "that it is just and right, agreeably to the true spirit of the constitution, that the prayer be granted;" or, "that this house is disposed to exercise their powers for the encouragement of all pious and charitable uses;" Bradf. L. 37, 223, 407; Laws of 1789, pp. 189, 198, 225, 285. They are retrospective to the property held by the society, before the incorporation, in some cases by deeds in trust for their use, in others, to the society by their name of association only, of which there are more than thirty instances in Bradford's laws, which fully establish the fact of the universal usage throughout the state, for all religious societies to enjoy estates without actual incorporation.

What expresses the sense of the legislature most unequivocally is, the law of 1789, which, after reciting the 45th section of the constitution, declared so much of the law of 1779, relating to the college and charitable school of Philadelphia, as was repugnant to the charter from the proprietor, to be void, on the ground, "that the charter gave them rights which were entitled to encouragement and protection in the free enjoyment and exercise thereof, in conformity to the will of the donor, in the same manner as it could have of right occupied and enjoyed the same under the former laws and constitution," and that the law was "repugnant to justice, a violation of the constitution, and dangerous in its precedent to all incorporated bodies, and the rights and franchises thereof;" 2 Dall. L. 650, 651.

When such is the effect of the constitution, it certainly could not be the law of the state, that bodies united or incorporated, needed any other protection for their rights, privileges or estates. They could be submitted to no other test than usage; and though the legislature could not be coerced to grant an incorporation, they could not infringe any right which could be enjoyed under the constitution. They might refuse them the franchises necessary to transmit property by mere succession, and to govern the society by corporate officers and by-laws; but as all the individual members were capable in law of acquiring it, no power could take it from them.

The inhabitants of a town may take in succession by a grant to their singular heirs, a private person may build and endow a house for a school, an hospital, a church, or abiding houses for the poor, without incorporation; but he could not, by his own grant, give it the corporate franchise of succession; 10 Co. Rep. 26, 27; 2 Co. Inst. 202; 9 Cranch 329. The rule of the common law is recognised and well illustrated in the preamble to the 39 Eliz. ch. 5, for the erection of hospitals, &c., by private persons,—the reason for which is declared to be, "understanding and finding that such good law has not taken such good effect as was intended, by reason that no person can erect or incorporate any hospital," &c., "but her majesty, or by her highness' special license, by letters patent in that behalf to be obtained." The act then authorized the creation of incorporations by the deed of the founder enrolled in chancery, without any act of the crown, with full corporate powers and franchises, and to make any by-laws not repugnant to the laws of the kingdom. Keb. St. 921; 2 Ruff. St. 687, 688. This statute was evidently the pattern

for the act of 1791, as appears by the title, the preamble, and the enacting clauses. Neither contain any restrictions on any unincorporated societies or bodies: their provisions are remedial, in order to facilitate the enjoyment of charitable donations, and the furtherance of charitable objects, by corporate franchises; to enable an individual to do what he could not do without a law;—to give a private deed the effect of a public grant, in order to complete the pious and charitable work by the charter of the donor or founder, without a special application to the crown or assembly; 10 Co. Rep. 25–34; 9 Cranch, 49. Both laws are founded on an existing right to make the donation; and if the right of property had not been understood to have been fixed and settled, the legislature would never have interfered to secure its enjoyment in perpetuity by succession, as a continuing corporate franchise with no other limitation to the power of making by-laws, than the laws of the land, the will of the donor or founder, and the articles of association; placing the incorporation on the authority of parliament, in England, and in this state making it a contract or legislative grant, the obligation of which cannot be impaired by the state.

All the analogous legislation of England is bottomed on the right of private persons, singly or associated, to take and hold estates of inheritance by apt words of grant to themselves and their heirs, which is a common law right of all subjects who are under no legal incapacity. In this respect the law of both countries is the same; the only difference between them consists in two particulars:—1. In England, those persons who have devoted themselves to religion, withdrawn from the world, and entered into holy orders, are not deemed in law to have any civil existence until they have acquired the capacity of natural persons by the removal of the disabilities arising from their profession and the restoration of their original right. In this state, there is no such disability; the bill of rights declares it to be the natural and inherent right of all men to acquire, possess and enjoy property, and the constitution protects all members of society in their persons and estates; no common law disability, therefore, can obstruct the vesting of a constitutional right, and as no law can take it away, no charter is necessary to confer it, or to restore what has not been relinquished or lost. 2. In England, there are statutory disabilities on corporations, whereby they are less favoured than individuals or bodies not incorporated; but, in this state, they are subject to no restraints, and in the constitution are placed on the same footing of protection as private persons or bodies united without a charter—there is of course no necessity of any law to repeal a statutory disability, or of a license by any subordinate authority, to perfect a right conferred by a supreme law. If an act of parliament had contained the same provisions as the constitution of this state, and the statute of 34 & 35 Hen. VIII. had contained no exception for coporations, there could have been no doubt that any religious society could have taken an estate in fee without a charter, and enjoyed it in mortmain without a license. There can be no clearer evidence of the common law right, than the enaction of statutes to take it away, nor is any rule better established, than that an exception of a particular case is an admission that the case would have been embraced in the law or constitution, if no exception had been made. 9 Wheat. 207; 12 Wheat. 436–8.

[Magill *v.* Brown.]

The application of this rule to the jurisprudence of this state will furnish a solution of all the difficulties which have attended the investigation of the law of charities, and lead to results which cannot be erroneous. The reason of the law is the law itself, and we have only to look to the reasons which call for an incorporation in England, for the want of an act of parliament removing the disabilities of religious persons, and to bear in mind that the effect of the constitution must necessarily be that here ecclesiastics or persons in holy orders have a capacity to purchase, which is denied to them by the policy of the common law. Hence arises the necessity of an incorporation by charter or prescription, to give them the capacity of natural persons, by removing the disability arising from their being professed men of religion, as monks, friars and canons, who are deemed dead persons in law; but when one of them becomes a bishop, an abbot, &c., he is the head or sovereign of the house, having a secular capacity to purchase and hold land, through whom the monks or the convent become as natural persons, and remain so while there is a sovereign or head. A grant to an abbot and his monks, or to the abbot and convent, is good, and vests the title in perpetuity; if the grant is made while there is a vacancy in the head or sovereignty, the fee remains in abeyance, but vests whenever the vacancy is filled. Perk. §§ 3, 51, 55; Litt. §§ 443, 655; Co. Litt. 263, 346 b; 9 Cranch 47, 329; 2 Pet. 580. The reason why a grant to monks or to a convent, who have never had a head or sovereign by charter or prescription, is bad, is, "that when a man taketh lands or tenements by purchase he ought to be of ability to take the same when it falleth to him by purchase;" Perk. § 505: monks have not this capacity, because they are all dead persons in law; but the abbot, who is the sovereign, &c., and this by reason of the sovereignty, for otherwise he should be but as one of the other monks of the convent; Litt. § 655; Co. Litt. 345 b.; and the grant cannot take effect, though a corporation was made afterwards; 2 Co. Rep. 51 b.; Hob. 33; 8 Vin. Abr. 56, H.; Perk. § 3–4; Co. Litt. 2 a., 3 a.

The reason of this rule shows that it is confined to grants to persons who have no personal capacity or civil existence; it cannot apply to natural persons, who have a common law right, guarantied in this state, and declared inviolable, as to whom a charter could have no effect except to confer some corporate franchise which was not of right by law. There is no rule of the English law which requires a charter to enable a society or body of capable persons to take and hold property in fee by proper and apt words of inheritance; any opinion to the contrary must be founded on the misapplication of the foregoing rule, as is evident from the cases referred to by the counsel in the argument of the case in 4 Wheat. 1; and in not discriminating between the right of holding an estate of inheritance with and without proper words to convey it, and between the effect of a deed, which transmits from ancestor to heir, or a charter which passes it from predecessor to successor. A grant to the commonalty, parishioners, inhabitants or good men of a place, (Co. Litt. 3 a.,) the commoners of a waste, (Sheph. Touch. 236–7,) the people of the county of O., or to associates, being a settlement of Friends at S., does not enable them to hold an inheritable estate without a charter; (Perk. § 510,) if they could take any estate or privilege it would be only for the lives of the

then existing inhabitants, (2 Johns. Cas. 323; 9 Johns. Rep. 75,) as in case of a grant to a single person, omitting "and his heirs." They are capable of taking the fee by proper words of grant to themselves and their heirs, or to another in trust for their use; (8 Johns. Rep. 388; Sheph. Touch. 337,) but some person or body politic, must be named who can take by force of the grant as a mayor and commonalty, (Perk. § 64,) or the church-wardens of such a church, (Perk. § 55.) in ancient time, (Co. Litt, 3 a.,) and now by custom. Croke Eliz. 145, 179. The parishioners, inhabitants or good men of Dale are capable to purchase goods by such name, (Co. Litt. 3 a.;) the only reason why they cannot purchase in fee by that name is that they are not a permanent, (Hob. 86) continuing body having succession; any estate conveyed to them in fee, must descend to their singular heirs, unless they have by charter or prescription the franchise of a body politic, which is the only thing required to enable them to hold in perpetuity by succession.

These considerations lead to the object and effect of an incorporation in England, first, to give to ecclesiastical persons the same civil capacity to purchase as other natural persons have by right; and, secondly, to confer the franchise of succession. In this state, the first object is effected by the constitution, and the incorporation is necessary only for the second; the only difficulty then is to distinguish between the natural rights of all the members of the society which constitutes the state a body politic, and those which are conferred by charter or law on a body of men who are the members of a society united for particular purposes. The common law requires no charter to enable a body of men in any place to purchase chattels or receive donations of money, a chattel interest, or an estate for the lives of the grantees, in land, by their name, as a body, without other words; if one is necessary, it can be only to give them some privilege, immunity or exemption from the rigour of the common law, so as to make them as a natural person capable of enjoying an estate in fee without words of inheritance.

A corporation is a permanent thing, that may have succession, an assembly of many into one body, (Terms of Law, 123,) an artificial body constituted of several members, united by its franchises and liberties, which form its ligaments and are its frame and essence, (Lilly's Pr. Reg. 459,) which never dies, and exists only in its political capacity, (1 Bl. Com. 468–70,) which unites and knits them together as a natural person, (Ib. 272;) or a person who is made by policy and fiction of law, a body politic, with the capacity of succession in perpetuity, but which exists in both a natural and political capacity; Wood. Inst. 109; 1 Bl. Com. 468–70. The corporation aggregate which never dies and can take only in one capacity, holds in perpetuity by a grant to itself without words of succession; but a corporation sole existing in both capacities, takes only for life, unless the word successors is added, so as to denote the intention to convey to him in his politic capacity of succession; Co. Litt. 8, 9, 94 a., 96 b., 250; Perk. § 240; Plowd. 496; Wood Inst. 111; Terms of Law, 124; Croke Jac. 532. Succession is a corporate franchise, by which property passes from predecessor to successor, as it does from ancestor to heir, by inheritance; Terms of Law, 123; 4 Co. Rep. 65 a.; succession is not a word of inheritance; a grant to a private person and his succes-

sors, carries only a life estate; succession must be granted by a charter from the crown, or a law making the grantees a corporation, so that their rights devolve on their successors by virtue of the franchise.

The object and effect of the incorporation is to create the artificial person with the same capacity as the natural person; whenever it exists as a perpetual body, in the exercise of this franchise, its uninterrupted enjoyment is evidence of a charter presumed to be lost, and it is a corporation in fact and in law; Perk. § 34; Co. Litt. 132 b.; 2 Day's Com. Dig. 300; 1 Saund. 345; 1 Mod. 55. The word successors is not in all cases indispensable to vest an interest by a grant or an obligation in the successor of a sole corporation; as where a grant is made to an abbot and his convent, to hold in frankalmoigne, the tenure imports succession, and as the celebration of divine service, and free alms are continuing objects, the estate is in perpetuity, as in case of a gift in frank marriage; Litt. § 133; Co. Litt. 93 b., 94 a.; S. P. 3 Pet. 146–7. So where, by a local custom, the right passes to the successor, though not named, as the chamberlains of London; Terms of Law, 124; 1 Lilly Pr. Reg. 383–4; 4 Co. Rep. 65 a.; Croke Eliz. 464, 682; Hob. 247; 5 Day's Com. Dig. 17; so, of church-wardens who are a corporation by prescription throughout the kingdom, with capacity to take and hold money and chattels for the church, but not lands, yet they may hold lands by special custom in succession as a corporation; March, 67, pl. 104; Croke Eliz. 145, 179; Croke Jac. 532; Croke Car. 455; 9 Cranch 45, 53, 328; 17 S. & R. 92.

Neither are any particular words necessary to create the corporation; a public grant of corporate privileges is, *per se*, an incorporation to give the capacity of enjoyment according to the grant; as to the inhabitants of a town, to have *guildam mercatoriam*, which unites them by the franchise, and makes them as a natural person for the purpose; 10 Co. Rep. 30 a.; 1 Roll. Abr. 513; 1 Bl. Com. 474. And as the only thing for which a charter is necessary is, to grant the franchise of succession, its actual enjoyment and exercise is, *per se*, evidence that it was by lawful and competent authority; 1 Bac. Abr. 500; 10 Co. Rep. 28 a.; 1 Bl. Com. 475–9; 1 Lill. Pr. Reg. 459. London itself is only a corporation by prescription; 5 Day's Com. Dig. 17, H.

If then the religious, literary and charitable societies which have existed in this state had no other foundation for their rights of property, than the principles of the common law and long usage, they could not be disturbed for want of an actual incorporation by charter or law; and when we add to these rights, those expressly secured to them by the constitutions of the state and union, we cannot doubt that they are as inviolable as a charter could make them. To decide that one was necessary to enable a religious society to enjoy the sites and buildings for worship, for charity, for education and sepulture, and funds for the maintenance and support of poor, would be a declaration that the rights of conscience and worship could be made dependent on the discretion of the legislature. And, if a charter could be withheld from any society, united for religious purposes, so as to impair their rights of property, then a preference could be given to modes of worship; there would be a virtual prohibition of the free exercise of religion, and the sect favoured by the legislature, would be, in substance, a religious establishment.

Connecting with the whole course of the legislation of Pennsylvania, the

well known fact which appears in the record in this cause, that the societies of Quakers have never been incorporated, it is not credible, that their right to hold their places of worship and charity, and to enjoy donations of land and money, is a mere shadow, without a charter in fact. In our opinion, they have had from 1701, and yet have, a charter more firm than any patent or law can create, the great charter of Penn, which was the basis of the usage and custom of the province, and by its incorporation into the supreme law of the state, is the rule and standard of right by which our judgment must be guided. The law of 1777 repeals all laws inconsistent with its provisions, whether those of the mother country or the colony; and declares that laws not inconsistent with it shall remain in force, as well as such statutes and common law in England as have been heretofore adopted. The laws of 1705 in relation to deeds and wills, which have no exception of corporations, the law of 1730–1, which actually amortises the sites of houses of worship and burial grounds, then in possession of religious societies, devoted or erected for the purposes of religion or charity, was also a direct license to all protestant religious societies to take and hold in mortmain by future grants and gifts. The law of usage which, being saved by the constitution, became a supreme law, gave the same right to all societies united or incorporated for these purposes, whether protestant or not. As the custom of the province was in accordance with the rejected laws of 1710, in relation to the powers and duties of courts of equity, to the law of 1711, for the confirmation of public grants, and of 1712, in relation to religious societies, and the various acts concerning liberty of conscience and the privileges of freemen, and as this custom is the law of the state, according to which, lands have been held in mortmain from its first settlement, we are bound to give it the same effect as is given to the custom of London, by all the rules and principles of law in relation to the construction of statutes.

We must apply those which have been adopted on the 43 Eliz., as laid down by the supreme court, to the constitution and laws of the state, and construe them most favourably and benignly, for the promotion of all objects connected with the maintenance of religion, the advancement of learning, the relief of the poor, and public utility; so that the rights, privileges, immunities and estates thus guarantied, shall be enjoyed unimpaired here, at least as far as they are in England, by this statute. No one can compare its provisions with the legislation of the state, and hesitate, for a moment, in saying, that they fall far short of the protection given by our own laws to donations for pious and charitable uses. If the 43 Eliz. has by universal consent been considered as *pro tanto* a repeal of the statutes of mortmain, of superstitious uses, and restraints on corporations by the statutes of wills, they cannot be in force in this state, unless we reverse the whole course of the law, in the exposition of statutes, by construing them liberally in favour of forfeitures, and strictly against charities, so as to abrogate common law rights by equity, and defeat the remedy provided by statutes for their protection.

It must be remembered, that these are mere statutes of policy in contravention of the common law. The old statutes of mortmain were passed to prevent the king and mesne lords from being deprived of their seignoral and feudal rights accruing by prerogative and tenure. The statutes of Hen. VIII.

and Edw. VI. were aimed avowedly against the rights of the catholic religion. Its suppression being their great object, donations for its support were declared "to be superstitious uses, *mala in se*, and destructive to our constitution and government under the protestant religion; therefore the law prohibits them, but it is not so with charities, which have always been favoured." The true foundation of the statute of mortmain of 9 Geo. II. was, that enough of lands had got into the hands of corporations that were indissoluble; and even now charities may be established in the lifetime of a person, but shall not be done in his last moments; 3 Atk. 148, by Lord Hardwick. The history of the times gives another reason for this statute: it was passed in the session of 1735–6, during a period of high excitement against the catholics, and when the church was deemed to be in such danger that a bill for the relief of the Quakers from severe disabilities was thrown out in the house of lords after passing the commons; 5 Hume 617–18; 3 Rapin 225–6.

It is not congenial to the policy of this state to incorporate such principles into its system, nor would it be creditable to the character of its legislation, to expound it unfavourably to those rights and institutions which were favoured, protected and spared by the laws of a king who spared little besides. If any statutes were suited to the policy of the state, they are the 43 Eliz., and the 7 & 8 Will. III. ch. 37, an act for the encouragement of charitable gifts and dispositions, which in favour of learning, charity and other good and public uses, authorized the king to grant licenses to any person or persons, bodies politic or corporate, their heirs and successors, to purchase and alien land, in mortmain, in perpetuity or otherwise, without being subject to forfeiture; 3 Ruff. 636. It may well be presumed, that the emigrants from England brought with them these principles for adoption, and engrafted them into their system of religious toleration and charities; but that they ever adopted any law which created a forfeiture for an alienation of property to any religious, literary or charitable society or corporation, or prohibited donations for the uses of worship, according to the ritual of the catholic church, is utterly inconsistent with the established usage, and every law of the state or colony from the earliest to the present time.

The law must be settled beyond all doubt before we can feel justified in deciding, that the rights of religious societies, and of charitable and literary institutions in Pennsylvania, are less firmly established than they were in the mother country.

As to the statutes of superstitious uses, it suffices to say, that where there can be no religious establishment, no restraint on the free exercise of religion, and no preference of modes of worship, the celebration of divine service according to the rites of any church or society worshipping the supreme Being, cannot be deemed unlawful or superstitious; nor can an actual incorporation or express license be necessary to give to any society or body of men, the capacity of enjoying any right in accordance with a custom or usage, incorporated into the constitution, in order to save a forfeiture, by an alienation in mortmain, where none is in a like case imposed by the law of England.

The revolution devolved on the state all the transcendent power of parliament, and the prerogative of the crown, (4 Wheat. 651,) and gave their acts the same force and effect; consequently, a grant, charter or law made by its

authority is, by the principles of the common law, equally binding on the state, as a patent or act of parliament is on the king. The state can take no estate by forfeiture when the alienation is expressly authorized by its laws, and the enjoyment of the estate secured to the grantee by constitutional provisions, which except the subject matter from all the powers of government.

It would be a remarkable feature in the legislation of the state, if, while its successive constitutions have made the rights of bodies united or incorporated its especial favourites, and its laws give the right of self-incorporation to all religious, literary and charitable associations, and so far depart from the jealous policy of the state against chancery jurisdiction, as to provide special remedies for the execution of trusts in their favour, both as to real and personal property, they should be still considered as reprobates, outlawed by the statutes of mortmain, and their estates forfeited by the very act of a conveyance to a corporation directly, or to trustees for their use. If any, the least respect is paid to the constitutions, they must be considered as placing corporations on the same footing at least, if not a better, than in England; yet if the judicial *dicta* which we find in the cases are the law of the state, the statutes of mortmain are in full force, while those which have softened their rigour have not been adopted, and the supreme law of the state is a very nullity, incompetent to protect charities, even to the extent of the 43 Eliz. or the 7 & 8 Will. III. There is no escape from this conclusion, if we take these *dicta* as the settled law of the state. If the statutes of mortmain are a part of the jurisprudence of the state, they have been so from its first settlement; and as they have been in no way modified or altered, they must be taken to have been adopted to their full extent, so as to cover the mischief they were intended to remedy, by creating the forfeiture, and giving the state the right to seize the lands aliened, or the mesne landlord to enter, as the land may have been held under the one or the other; 7 S. & R. 320.

As the tenures of Pennsylvania are free and common socage, there were no seignoral rights accruing by tenure, which could be defeated by an alienation in mortmain, except in case of a person seised of lands, dying intestate, and without known kindred, when the land escheated to the immediate landlord of whom it was holden, or to the proprietary, if he held immediately from him; according to the colonial law of 1705, (1 Dall. App. 45, § 12.) which remained in force till 1787, when the escheat was declared to be to the state; 2 Dall. 553. The mesne landlord, then, was till that time, entitled to the benefit of the forfeiture, and the license of the king or proprietary was no dispensation without the consent of the party to whom it accrued; the king could renounce his own right, but not the right of a subject: before the statute of Will. III., it could be done only by the power of parliament; Vaugh. 333–43–56; Co. Litt. 99 a. By the law of England, the license of the king and mesne lords is not alone sufficient; there must be a writ of *ad quod damnum*, to ascertain what damage it would be to any other person, to alien in mortmain; F. N. B., Ad. Q. D. (222) 493, &c. It follows, that a patent, license or charter from the proprietary, under the colonial government, or from the president of the council, before 1787, would not have saved the forfeiture to the immediate landlord, without his consent, and the writ of *ad quod damnum;*

for if the statutes were in force, either by adoption or as "the general course of the law of England," or the common law, they remained in force till they were altered or repealed, as declared in the acts of 1718 and 1777, as fully as if they had been re-enacted; and a license can have no greater effect here than it had in England before the statute of 7 & 8 Will. III., which was passed in 1695, thirteen years after the charter to Penn. "With respect to English statutes enacted since the settlement of Pennsylvania, it has been assumed as a principle, that they do not extend here, unless they have been recognised by our acts of assembly, or adopted by long-continued practice in courts of justice;" 3 Binn. 597. As there is not a spark of evidence of such recognition or adoption, we have no legislative or judicial authority for saying that it is now in force; consequently, no license would save the forfeiture before 1787.

The supreme court has declared it to be a point conceded, that the 43 Eliz. has not been extended to this country. "But we consider the principles which chancery has adopted in the application of its principles to particular cases, as obtaining here, not indeed by the force of the statute, but as part of our common law, and where the object is defined, and we are not restrained by the inadequacy of the instrument which we are compelled to employ, nearly, if not altogether, we give relief to that extent that chancery does in England;" 17 S. & R. 91. Assuming this position of the court to be correct, the inevitable conclusion is, that we have not adopted the great operative principles, by which it has been held in courts of law, as well as in equity, to be a repeal of the statutes of mortmain, *de donis conditionalibus*, and of the restriction on corporations by the statute of wills; 3 Atk. 150. This is the effect produced, which has given to that statute its importance: those statutes interposed barriers to the vesting and enjoyment of property for pious and charitable uses, which the 43 Eliz. removed, so that they became opened for the exercise of the equity powers of courts of chancery as completely as if no previous disability by statute had ever existed; and this is the reason why it has ever been considered in England as the Magna Charta of charities, that, being an enabling statute, it repealed all disabling ones.

If we assume that this leading feature, this vital spirit of the statute, has not been adopted here, we should be bound to consider the prohibitory statutes which it repealed, as in force here in all their rigour; if we follow the report of the judges made in 1808, as explained and adopted by the declaration which they made in subsequent cases, in connexion with the opinion in *Witman* v. *Lex*, above quoted, we must declare the law of mortmain to apply to all donations of land to corporations, for pious and charitable uses, without the benefits of the statutes of Eliz., or Will. III., to mitigate their severity or save the forfeiture. Strange as this result may be, it is unavoidable, if the protection which these statutes throw around charities in England does not exist here, or has been taken away by the statute, common law or usage of the state. They operate equally on all societies, whether incorporated by prescription, by special act of assembly, or the charter of the proprietary; so that the enjoyment of their estates depends on legislative discretion, in granting a dispensation of the forfeiture, accruing by an alienation to bodies, and for purposes not only valid, but favoured, encouraged and protected in

England, without license, under the 43 Eliz., or by the license of the king under the 7 & 8 Will. III. This latter statute was passed shortly after the first settlement of this colony; its words show the policy of the times to be favourable to all charitable institutions, and connected with the political history of England, its passage is a striking illustration of the disposition of parliament to make them its peculiar favourites.

One of the great principles of the revolution of 1688, was a denial to the king of the power of dispensing with, or suspending of laws, or the execution thereof. It was the first item of abdication of the crown by James II., as set forth by the lords and commons in convention, that he had exercised it without consent of parliament; and a declaration that it was illegal, was the first and second items of the bill of rights, (3 Ruff. 440–1,) which was made a fundamental law of the kingdom. There could therefore be no stronger indication of the spirit of the times in favour of charities, than by authorizing the king to dispense with the statutes of mortmain in their favour, making it an exception to a great rule and principle of government; and we deem it incredible, that a less liberal spirit could have entered into the legislation of the colony: yet, if the statutes of mortmain have been adopted, there can be no power to dispense with their forfeiture, but by the legislature. The principle of the revolution of 1688 has been carried into all the American constitutions: no governor can exempt a corporation from the forfeiture of mortmain by his license or charter, with a clause of *non obstante statuto*; and no act of assembly before or since the revolution has exempted charities from the effects of mortmain. There are, therefore, but two alternatives for us to adopt; the first, that the statutes of mortmain have been in force from the first settlement of the province, that the statutes which, in England, have mitigated their rigour, and made them in some measure conformable to our usage and condition, the laws and constitution, have not been adopted, and that there has never been any power to dispense with the forfeiture, unless in the party to whom it accrued. Or, that they never were introduced by our ancestors, as any part of their code. In the choice of these alternatives, we cannot hesitate—we cannot look at one item of legislation upon the subject, whether of supreme or subordinate authority, or into the ancient customs and unbroken usage of the state, without at once perceiving the total repugnance between the whole policy of the state, and the existence of British statutes, which would compel us to declare that every house of worship erected in the colony from the time of William Penn, stands upon ground forfeited by a conveyance to a religious society or corporation. It was due to the weight of judicial authority which bore on these questions, to examine them through the details of the law of England, as well as of the state, before we would venture to dissent from it; it was due especially to the high legislative authority which has declared what in its view was the policy and law of the state, as to the disabilities of corporations. The thirty-fourth section of the judiciary act makes it our duty to make state laws the rule of our decision, unless they are repugnant to the constitution, laws or treaties of the United States. The preamble to the act of 6th April last, contains a plain declaration, that "no incorporation, though lawfully incorporated or constituted, can, in any case, purchase lands within this state,

either in its corporate name, or names of any person or persons whomsoever, for its use, directly or indirectly, without incurring the forfeiture of said lands to this commonwealth, unless said purchase be sanctioned and authorized by an act of the legislature thereof; but every such corporation, its feoffee or feoffees, hold and retain the same, subject to be divested or dispossessed at any time by the commonwealth, according to due course of law; Pamph. 467–8. On the other hand, we have the supreme law of the state in two constitutions, declaring—one, that the declaration of rights is hereby declared to be a part of the constitution of the commonwealth, and ought never to be violated on any pretext whatever; the other, that every thing contained in the bill of rights is excepted from the general powers of government, and shall for ever remain inviolate: among these rights are enumerated those of "all religious societies, or bodies of men heretofore united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, which shall be encouraged and protected in the enjoyment of the privileges, immunities and estates," &c., in the constitution of 1776; and "the rights, privileges, immunities and estates of religious societies and corporate bodies," are, by that of 1790, declared to remain as if the constitution had not been altered, and the first article of the schedule expressly saves the rights of incorporations.

We have felt it our duty to consider the law of the state to be as thus declared, and we have been unable to bring our minds to any other conclusion than that any English statute which impairs the right of any corporation to enjoy an estate for its own use, is entirely inconsistent with the usage and constitution of the state, and could never have been in force by adoption, without deranging the whole system of policy, built up by a uniform course of the common law and legislation of the state for a century and a half.

If, however, we have not succeeded to that extent, we apprehend there can be little doubt that these propositions may be considered as established: 1. That, construing the legislation of the state by the rules which have been applied to the 43 Eliz., the statutes which would prevent the effectuation of any objects declared lawful, and by any disposition made valid and confirmed by law, must be considered as repealed so far as they embrace these objects and dispositions. 2. That conveyances and devises of land for religious, charitable, literary and public purposes, must be taken to be, within the meaning of the act of the 6th April, 1833, a purchase "sanctioned and authorized by an act of the legislature." 3. The constitution is an act of the supreme legislature of the state, which authorizes all societies or bodies of men, united or incorporated, to hold and enjoy to themselves, and in their own names and right; and the acts of 1730, 1818 and 1825, are legislative sanctions of their right to hold and enjoy lands, money and chattels for all these purposes.

We should have rested satisfied with results so satisfactory to our minds as these, if they had not been in some respects at variance with the understanding of the supreme court of the state, as to the law of mortmain, and the decision of the court in the *Baptist Association* v. *Hart*. Opposed to such authority, it would have been our duty to have surrendered our own judgment, unless we had found it supported by the constitutions of the state, and the United States.

Bound to decide on the laws of a state, as the courts of a state do, we must look to that which is supreme, as the only rule of our decision, where its language is plain; in its application to this case, it cannot be mistaken, nor can we overlook the first amendment to the constitution of the United States, which, in our opinion, wholly prohibits the action of the legislative or judicial power of the union on the subject matter of a religious establishment, or any restraint on the free exercise of religion. We know of nothing which would so directly tend to infringe this prohibition as a law to declare that no religious society should be capable of enjoying land for the purposes of sepulture, worship or charity, without a license from the state; if the legislature can seize it as forfeited, they may impose the most effectual restraint on religious worship, by taking from the society the ground whereon, and the building in which they celebrate it; and no preference of modes of worship can be so repugnant to the rights of conscience and equality of religious right, as to license one society to do what they prohibit to another. With such rules for our guide, we could follow no other.

The objection to the devise of the eight acre lot is thus narrowed to the want of residence of some of the members of the yearly meeting in the state. This is founded on the act of 1730, which is confined to religious societies within the province. In the case of the *Methodist Church* v. *Remington*, the supreme court say, "if the trust before them is to be sustained only by the enabling provisions of the law of 1730, it must fall: on the other hand, it is fair to say, that, though it derives no support from the statute, it is not necessarily prohibited by it; for it is an undoubted rule of construction, that an affirmative statute such as this, does not take away the common law, and there was certainly no absolute prohibition of such a trust by the common law, or any previous statute." The objection is therefore not sustained by this decision, still less by the opinion in the case of the *Baptist Association* v. *Hart*, where the court declared that a devise in Virginia to a charity in Pennsylvania would have been good if the plaintiffs had been capable of taking; (4 Wheat. 27–29,) and it is in direct opposition to the common law in relation to bequests of personal property for charitable purposes, to be expended in Ireland, (1 Br. Ch. 274,) Scotland, (1 Br. Ch. 571; Amb. 236; 14 Ves. Jr. 537; 16 Vez. Jr. 337,) or for the support of a bishop in America, (1 Br. Ch. 444,) all of which have been held to be good; 3 Pet. 500–1–2.

The yearly meeting of Philadelphia is a protestant religious society, which has existed from the settlement of the colony, with known and recognised capacity of taking and enjoying property according to the law and usage of the province and state, as well as the principles of the common law. They must be considered as a body politic or corporate by prescription, possessing and enjoying the franchise of succession, with the same rights of property as a natural person does by inheritance. We cannot impair the rights of the body united by their franchises, by inquiring into the separate capacity of its component members. They might be in part persons who could not hold for their separate use; but that would not change the character of the society, nor affect their constitutional rights as a body united for the purposes of religion and charity, located within the state; and, as such, they would come within the equity, if not the words, of the law of 1730. Be that as it may, they can-

not be excluded from the protection of the constitution and usage, in the absence of any law requiring the residence of all its members within the state, or any rule of the common law, which imposes any disability upon the citizens of one state holding property in any other state, as its own citizens may do. The objection to the bequests of money to the quaker societies in Maryland, Virginia, Ohio, and to the citizens of Winchester, assumes a different shape. Their alleged incapacity arises from their being composed wholly of the residents of other states, which must be tested by the law of the domicil of the testatrix. There is none which denies to the citizens of other states any rights of property which can be enjoyed by the citizens of this state under its constitution and laws, which declare them inherent in all persons. The laws for the enforcing the execution of trusts extend to all "personal property vested in any person or persons, to be applied by them to any religious, literary or charitable use or uses," and the *cestui que trust*, or other person interested in the execution of the trust may apply to the courts of the state to compel the trustees to account, or to prevent the failure of the trust.

The constitution of the United States declares, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" this instrument was adopted by the same power which established the constitutions of the several states, and is a part of the supreme law of each, as fully as if it was incorporated in its body. We must take it therefore as a grant by the people of the state in convention, to the citizens of all the other states of the Union, of the privileges and immunities of the citizens of this state; no law of the state has given it any construction which in any way restricts its operation, and it is not the duty of any federal court to so expound the constitution as to weaken the bond existing between the states which have established a "general government of the union," a federal government of these states, by restraining the grants of rights or powers within limits narrower than the tenor and purport of the words used, according to their common acceptation.

"It cannot be presumed that any clause in the constitution is intended to be without effect, and therefore such a construction is inadmissible, unless the words require it." 1 Cranch, 174–6. This clause is copied from the fourth article of the old confederation, and is one of the most important in the whole instrument; it becomes senseless if it is not applied to the rights of property. The political rights of the citizens depend on the laws of the respective states, (Art. 1, § 2, clause 1, Const. U. S.,) rights accruing by contract cannot be impaired in their obligation by state laws, (Art. 1, § 10,) and personal rights are protected by the 2d and 3d clauses of § 9, Art. 1, of the constitution, and the 9th amendment; leaving no subject on which this clause can operate except property.

The words "privileges and immunities" relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places, (7 Day's Com. Dig. 113, Privilege, A.) whereby a particular man, or a particular corporation is exempted from the rigour of the common law, (Cow. Inst., Tit. Privileges,) as converting aliens into denizens, whereby some very considerable privileges of natural born subjects are conferred upon them, or erecting corporations, whereby a number of private per-

sons are united and knit together, and enjoy many liberties, powers and immunities in their political capacity, which they were utterly incapable of in their natural. 1 Bl. Com. 272. Among the privileges of the citizens of every state, is that of exemption from the law of alienage, though not born in the state; and every body of private persons united or incorporated have the franchise and immunity of enjoying estates in succession in this state; these are exemptions from the rigour of the common law, which the citizens of other states may enjoy in this, as fully as the citizens of this state can. We can therefore make no distinction between these bequests and those to societies located in the state; the disability of alienage cannot be applied to the citizens, societies or corporations of other states, and they may enjoy property as it can be enjoyed of right by those which are within the state.

The next questions that arise on this will, are the uses for which the various dispositions are made. As the supreme court have declared it a settled point, that the 43 Eliz. is not in force, we must endeavour to ascertain from other sources, what uses are pious and charitable, as distinguished from those which are deemed superstitious or otherwise invalid. The general course of the law of England, as to the transmission of property, was declared, in the charter to Penn, to be the rule in the colonies, till altered or repealed, and the common law was recognised by the acts of 1718 and 1777 as in force, as well as such statutes as had been adopted. It is also a conceded principle, "that the colonists take with them such laws of the mother country as are useful and suited to their condition." 1 Journ. of Cong. 27. It will be necessary, therefore, to trace the law of charities through the English statutes which preceded the 43 Eliz. as well as the common law, so as to determine what was its general course, how far it has been adopted in the written law of this state, or has been the basis of its usage independently of the enabling or enacting provisions of the 43 Eliz. and 7 & 8 Will. III., assuming them not in force as adopted statutes.

The following statutes on the subject come strictly within the description of the supreme court of the United States, in 4 Wheat. 31; they embrace cases within the statutes of mortmain, and gifts to corporations, and are analogous to the 43 Eliz. in all their features; so that there can be no reason for not giving them the same effect and construction as has been given to that statute.

The following are uses declared to be pious and charitable, by a series of statutes commencing in 1285, and affirmative of the common law:—The statute 13 Edw. I., ch. 41, enumerates the maintenance of a chantry, lights in a church, divine service and alms. Keb. 49; 1 Ruff. 106; F. N. B. 465; 2 Co. Inst. 467. The statute 17 Edw. II., divine service, the defence of Christians and the church, liberal alms-giving, relief of the poor, hospitalities, and all other offices and services before due, by whatever name they are called. Keb. 36–7. The statute 15 Rich. II., ch. 6, the poor parishioners of the churches, the endowment of a vicar to do divine service, inform the people and keep hospitalities. Keb. 181; 1 Ruff. 402; S. P., 4 Hen. IV., ch. 12; Keb. 198. The statute 2 Hen. V., ch. 1, the sustenance of impotent men and women, lazars, men out of their wits, and poor women with child; the nourishing, relieving and refreshing other poor people. Keb. 212; 1 Ruff. 486.

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The statute 23 Hen. VIII., ch. 10, obits, masses and lights, to be kept not more than twenty years; the discharge of tolls and customs in a city in case of the poor, and the cleansing of the streets. Keb. 403–4; 1 Ruff. 171–2. The statute 37 Hen. VIII., ch. 4, § 5, alms to the poor, and other good, virtuous and charitable deeds. Keb. 608. The statute 1 Edw. VI., ch. 14, erecting grammar schools to the education of youth in virtue and godliness; the augmentation of the universities; better provisions for the poor and needy; the support of a schoolmaster, preacher, priest, vicar; the maintenance of pier walls and banks, and the relief of poor men being students or otherwise. Keb. 636–44; 2 Ruff. 397, &c. The repairing of bridges and highways, and setting poor people to work; 2 & 3 Edw. VI., ch. 5; Keb. 651; 2 Ruff. 412; 18 Eliz., ch. 20; Keb. 903–4; 2 Ruff. 623. The relief of the poor of every parish; 5 & 6 Edw. VI., ch. 2; Keb. 676; 2 Ruff. 639. The resuscitation of alms, prayer and example of good life in the realm; Keb. 730; 2 Ruff. 481. The relief of prisoners, 14 Eliz., ch. 5; Keb. 847; 2 Ruff. 606. The repair of churches, 13 Eliz., ch. 10; Keb. 839; 2 Ruff. 595. The maintenance and relief of the poor in houses of correction, impotent and maimed soldiers, 29 Eliz., ch. 6, § 7; Keb. 894; 2 Ruff. 656; 35 Eliz., ch. 1; Keb. 907; 2 Ruff. 672; and hurt and maimed soldiers and mariners, Keb. 911; 2 Ruff. 676. The maintenance of houses of correction, abiding houses, and stocks and stores therefor, 35 Eliz., ch. 7; Keb. 913; 2 Ruff. 678. The founding and erecting hospitals and houses of correction, for the relief and sustenance of poor, maimed, needy or impotent people, 13 Eliz., ch. 5; Keb. 921; 2 Ruff. 687; 2 Co. Inst. 120. Donations to hospitals, colleges and other places, founded, ordained, for the relief of poor, aged and impotent people, and maimed soldiers, 39 Eliz., ch. 6. Schools of learning; orphans, or such other good, lawful and charitable intents and purposes; reparation of high-ways and sea banks; the maintenance of free schools and poor scholars; orphans and fatherless children; and such like good and lawful charities; 4 Co. Inst. 166–7.

To which may be added the cases not enumerated or recognised by the words of the statutes, but which are within their equity, by adjudged cases. The erection of chapels of ease, as members of parochial churches; Hob. 123–4; or cathedral churches; Swinb. 66. Gifts for the advancement of religion, learning, piety and public utility; 11 Co. Rep. 70 b. 73 b.; 10 Co. Rep. 26; 8 Co. Rep. 130 b. Poor men decayed by misfortune or the visitation of God; Moore, 129. Persons imprisoned for conscience sake; Duke by Bridgman, 131. A bell for a church; pulpit cushion and cloth, and building a session house; Poph. 139. To maintain scholars who should use holy orders; Tothill, 61–2. The marriage of poor maidens; 1 Co. Rep. 26. Making a stock for poor labourers in husbandry, and poor apprentices; 1 Co. Rep. 26 a.; Keb. 1040; Ruff. 74; preamble to 7 Jac. I., ch. 3. Such things as concur in decency and order with the intent of the founder; Br. Duke, 155. The 43 Eliz., ch. 4, enumerates twenty-one cases as classed by Lord Coke, in 2 Co. Inst. 711, which were all comprehended in preceding statutes, or the cases above referred to, either in express or general terms.

This review exhibits a striking coincidence between the general course of the laws of England and Pennsylvania, in the designation by both of what are deemed and recognised to be the uses and purposes of piety and charity, protected and encouraged during the most intolerant times.

The same coincidence will appear in tracing to their origin in the British statutes, and decisions of their courts, the rules and principles upon which donations for such uses have been construed and governed, as well as the remedies provided for their enforcement. The statute 17 Edw. II., *de terris templarium*, established and ordained as law for ever, that lands which had been given and enjoyed for pious and charitable uses, should not escheat to the king or mesne lords of whom they were holden, on the extinction of the order of Templars, by whom they were holden for such uses. That they should be given to other men of holy religion, to the end that they may be charitably disposed of to godly uses. "So always that the godly and worthy will of the givers be observed, performed and always religiously executed;" Keb. St. 86–7; 8 Co. Rep. 131 b.; 10 Co. Rep. 34 b.; Co. Inst. 431–2; 3 Co. Rep. 3 b.; 7 Co. Rep. 13 a. The 37 Hen. VIII., ch. 4, and 1 Edw. VI., ch. 14, directed and empowered the king to dispose to the good, virtuous and godly uses specified in those acts, such parts of the suppressed lands, or their rents and profits, as had before been given to such purposes and misapplied. Also to dispose, change and alter donations given for superstition, to pious and godly uses, or to direct it to be done by the commissioners. The commissioners were directed to inquire what property had been given by deed or will to poor persons intended to have continuance for ever out of the chantry lands, and to make such assignment thereof, that the money should be paid to them according to the conveyance or will of the donor, and that all charges on those lands for charitable or pious uses, should be paid by the king's receiver; Sect. 12, 13. The commissioners were directed to execute their commission favourably and beneficially towards such uses and purposes, and their acts so made were declared as valid as if done by an express act of parliament; Keb. St. 636–44. The proviso in the fifth section of 39 Eliz., ch. 5, prohibited the diversion of the funds of any hospital to any other purposes than those appointed, and declared that such construction should be put upon the act as should be most favourable to the maintenance of the poor, and repressing all evasions of the act; 2 Co. Inst. 721–2. The commissioners were directed to make such orders and decrees as the said good and charitable uses may be fully observed in most full, ample and liberal sort, which not being contrary to the orders, decrees and statutes of the donors or founders, shall stand good according to their tenor and purport; 39 Eliz., ch. 6; 4 Co. Inst. 167. The laws for confirming patents and grants from the crown, declared them to be good and available according to their tenor and effect, their words and purport, and to be expounded most beneficially for the patentee, without license, confirmation or toleration; any misnomer, misrecital or misdescription of the premises, or a corporation, or any lack of attornment, livery of seisin, or misnaming any person or body politic, to the contrary notwithstanding; 18 Eliz., ch. 2; 43 Eliz., ch. 1; Keb. St. 852, 935; 2 Ruff. St. 612, 702.

These statutes were evidently the models from which the colonial acts of 1705, for confirming deeds, wills, and sales under acts of assembly, and the law of 1711, confirming patents, were drawn: the rejected law of 1712, in relation to religious societies, contains a most admirable summary of the effect of the general course of the statutes of England, as they had been construed

by courts of equity; and the powers conferred on the colonial courts by the acts of 1700 and 1710, shows the intention of the legislature, that they should be exercised to the same extent and in the same manner as they were by the high court of chancery in England. It is, indeed, impossible to compare the laws of the two countries on the subject of charities, without being struck with the strong analogy between them; the substance of the statute and common law of England was adopted in the early colonial laws, entered into the custom of the province, and will be found condensed in a few words in the 45th section of the constitution of 1776, with this marked difference, that what the 43 Eliz. has done by implication and the construction given by courts, the constitution has done by a direct affirmative declaration of rights. What was left imperfect was finished by the law of 1777, by expressly restoring the common law, repealing all laws inconsistent with the rights declared in the constitution, and declaring all colonial laws then in force and consistent with it to remain in force; this was going farther than the words of the 43 Eliz., which contained no repealing clause.

The law of 1791, giving the powers of self-incorporation to all religious, literary and charitable societies, was an improvement upon the pattern of the 39 Eliz., ch. 5; and the laws for the execution of trusts was an adoption of the whole course of chancery, in administering trusts for the use of charities; so that we may safely conclude that the English system of charities, as it was at the settlement of the colony, has become naturalized here, not only as to the principles of equity, applied to the 43 Eliz. but the substance and effect of the enabling provisions of all the statutes, including those of Eliz., by which the common law as to charities was restored in England, and brought here by the colonists unincumbered with restrictions.

The course of the law of England providing remedies for the enforcement and suppressing the abuses of charities, are next to be considered. The statute, 13 Edw. I., ch. 41, gave the following remedies where the lands were aliened; if the king is the founder, he shall seize and hold the lands, and the purchaser shall lose his money; if a private person is the founder, he or his heir shall have his writ to recover the same land in demesne; if the lands are not aliened, but the alms withdrawn for two years, he shall have an action by writ of *cessavit*; Keb. St. 49; 1 Ruff. St. 106; Keb. St. 30–1; 1 Ruff. 66; Litt. § 136; Co. Litt. 95-6. By the 2 Hen. V., ch. 1, hospitals were placed under the correction and reformation of the ordinary, by the ecclesiastical law; Keb. 212; 1 Ruff. 486. When the king was founder, the chancellor was visiter; Co. Litt. 95 b. 95 a. By the 37 Hen. VIII., all lands held by hospitals, chapels, &c., which came within the purview of the laws for the suppressions of the church lands, were placed under the supervision of the court of augmentations, who decided exclusively all cases concerning them, as well as charities charged upon them, where the king was concerned or could be prejudiced; but all controversies between subjects were to be decided by the courts of common law; Keb. 608–9; 2 Ruff. 371: all copy-hold lands, and all lands held by the license, assent, grant or confirmation of the king, were excepted from the operation of the law; 644–5. By the 39 Eliz., ch. 4, the chancellor was directed to appoint commissioners, to examine into the donations made for certain charitable uses, and correct their misemploy-

ment; Keb. 920; 2 Ruff. 687. The 39 Eliz., ch. 6, directed commissioners to be appointed, to inquire of land and goods given to any charitable uses, which had been misemployed, and to reform and correct their abuses. The party deeming himself aggrieved, may complain to the chancellor, who shall judge thereon according to equity; 4 Co. Inst. 167. This act was repealed by the 43 Eliz., ch. 9, but the proceedings under it were confirmed, (Keb. 648,) the adoption of the 43 Eliz., ch. 4, as a substitute for it, having made it inoperative. These statutes formed the law of charities in England before the 43 Eliz., and made a system which has received but little improvement, either by that or any subsequent statutes; the rules of their construction adopted by all the courts of England, have ever been of the most liberal tendency, to establish charities and correct the abuse or diversion of the funds devoted to their support.

The course of the common law on charitable and pious donations is in accordance with the spirit of the statutes before recited, and the rules established for their construction. It is an admitted principle, that the personal property of decedents was disposable to pious uses, for the good of the soul of the deceased; the children and kindred had claims upon the trustees, but came in under the title of charity; the distribution was made by the ordinary at his discretion, to charitable uses in particular, or for the good of the soul of the deceased, according to the circumstances of the estate; 2 Bl. Com. 494; 2 Forrest, 190; 4 Co. Inst. 336; 7 Day's Com. Dig. 612, N. 13; Moore, 822, pl. 1111; Ves. jr. 69. The executor held the surplus to account to pious uses; Carey, 28–29. A *feme covert* executrix, may give the goods of the testator for the good of his soul; Perk. § 7, cites 13 Edw. III. Any person who has power and capacity to make a grant or devise, may do it for pious and charitable uses; 7 Day's Com. Dig. 612; Br. Duke, 132. A testator by will, directed lands which were devisable by custom, to be sold by his executor, and the money to be distributed for the good of his soul; the executor held the land for two years without a sale, which the court held to be a breach of the intention of the testator, and they construed the will so as to make a condition, as such appeared to be the intention, the heir entered for the breach and recovered; 38 Ass. pl. 3; Lib. Ass. 221; Plowd. 345, 523. The king gives land to the good men of D. which was no corporation before, rendering a certain rent, and the residue to repair a bridge, the king released the rent, which being the cause of their corporation, would seem to have determined it, yet for the preservation of the charitable use, they shall continue a corporation for that purpose only; Duke on Charitable Uses, by Bridgman, 134, cites 40 Ass. 26; a gift to a parish for a charitable use by deed, is void, but a devise by will is good, and the church-wardens and overseers shall take in succession. *Ibid.* Land was devised to the church of St. Andrew in Holborn, which was not capable of taking and holding in mortmain, but the court on an *ex gravi querela* brought by the parson to execute the devise (F. N. B. 441, L.) awarded it to him, considering it to be the intent of the will, that the parson should have it, and not the church, and construed the words so as to preserve the intent, and not to destroy it; decided 21 Rich. II.; Perk. § 509; Plowd. 523; acc., 17 S. & R. 92; 9 Cranch, 43, 328; 1 Atk. 437; 3 Pet. 119, 146–7.

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A declaration by will, that a feoffee shall stand seized to the use of C., is a good devise of the land by intention, it being that C. should have the land. Dyer, 323, pl. 29; 1 Leo. 313; 15 Eliz. A gift of chattels to parishioners who are no corporation is good, and the church-wardens shall take in succession, for the gift is to the use of the church. 37 Hen. VI. 30; 9 Cranch, 328; 17 S. & R. 92; S. P., 1 Penn. Rep. 49–51. Courts will labour to support the act of the party, by the art or act of the law. Hob. 123–5; S. P., 3 Pet. 119. In 4 & 5 Ph. & M., a devise was made of lands to Trinity College and their successors for ever, for founding grammar schools for poor scholars, and held good by the equity of 1 & 2 Ph. & M., ch. 8, which suspended the statutes of mortmain for twenty years. Dyer, 255 b., pl. 7; 1 Co. Rep. 25–6, decided in 8 & 9 Eliz., C. B. Lands devised to employ the profits to find a priest to celebrate mass for the good of the soul of the testator, and other souls, as long as the laws of the land would suffer it; and if the laws prohibited it, then to the use of all the poorest people in six parishes, with power to the devisees to dispose of the profits at their pleasure to any of these purposes—the devise was held good, and not to be within any of the statutes. Anders. 43; Croke Car. 108; 2 Ch. Cas. 18 a., decided 3 Eliz. So of a devise to sustain poor men decayed by misfortune or under the visitation of God. Moore, 129, pl. 277, decided 24 & 25 Eliz.; or to relieve such as were imprisoned for conscience sake. Bridg. Duke, 131, adj. 41 Eliz. A devise to an idiot for a charitable use, though inoperative in his life time, takes effect when the land comes to the hands of his heir. Bridg. Duke, 134. A gift to find a chaplain *ad divina celebranda* is not for a superstitious use, and, though not within the 43 Eliz., is good. Carey, 39; Bridg. Duke, 154, adj. 18 Jac. I. acc. So for finding a bell for a church, a pulpit cushion and cloth—for the support of the poor, or building a session house—these are good acts of piety, charity and justice. Poph. 139. So where land was devised to divers persons and their heirs, in trust and confidence in them, out of the profits to erect a free school and to pay so much to the master yearly, and so much to the usher, and £20 per annum to five poor men. Croke Eliz. 288, *Martidale* v. *Martin*, adj. 34 & 35 Eliz., K. B. The same will contained another devise in trust—that a preacher shall be found for ever to preach the word of God in the church of St. Mary, in Thetford, four times a year, at ten shillings a sermon—both clauses of the will were adjudged good, by the barons of the exchequer and the judges of the K. B., who, after "often argument, agreed, that the 23 Hen. VIII., ch. 10, was to be taken to extend only to superstitious uses, by the words of it, in the very body of the act, and at the beginning, as by the time it was made—for at this time they began to have respect to the ruin of the authority of the Pope and the dissolution of the abbeys, chauntries and the like." Poph. 6, 7, 8, *Gibbons* v. *Mallyard and Martin*, adj. 34 & 35 Eliz. So of a devise for a free school, and the support of a master thereof, and certain alms-men and alms-women for ever; the devise was held to be valid, though it did not take effect, owing to the breach of the condition on which it was made to depend. 1 Co. Rep. 22–25, *Porter's Case*, 34 & 35 Eliz., in Exchequer. In the case of the *Mayor and Burgesses of Reading* v. *Lane*, a devise was made to the poor people maintained in the hospital of St. Leonard's, in Reading; the objection to the devise was, that the poor not being incor-

porated, were not capable of holding lands, but it was decreed, that as the plaintiffs were a corporation capable of holding lands in mortmain and governed the hospital, the land should be assured to them for the use declared in the will. Toth. 7; 42 Eliz. lib. A. fol. 706; Toth. 32; Bridg. Duke, 134 b. 361.

Charities have always been favoured in the law, by excepting them, when fastened on lands, from ordinary rules; where they are charged with services for the advancement of religion or justice, works of devotion, piety or charity, although the lord purchases parcel, yet the entire services remain. 6 Co. Rep. 2 a., 36 Eliz., in the court of Wards. As, to make a bridge or beacon, repair a highway, (6 Co. Rep. 1 b. 2 a.) to marry poor virgins, to find a preacher in a church, or the ornaments of a church, (6 Co. Rep. 2 a.,) or to bind a poor boy an apprentice, or to feed a poor man. Co. Litt. 149 a. The law was considered so well settled that Lord Coke in 34 & 35 Eliz., states unqualifiedly, that any man at this day may give lands in trust for any charitable use, to any person or persons and their heirs. 1 Co. Rep. 26 b.; Sheph. Abr. 1066. They are prohibited by no statute, and none were ever intended to overthrow works of charity, but to prohibit their abuse. Co. Litt. 342 a. The statutes of superstition did not extend to corporations, which were not both religious and ecclesiastical; (2 Co. Rep. 48–9,) gifts to lay hospitals remained valid—bishops, deans and chapters, parsons, vicars, abbots, church-wardens, &c., could hold lands notwithstanding the statutes of mortmain, as they were not dead persons in law, but had a capacity to grant or to hold land, to sue and be sued. 1 Bl. Com. 472–5; 2 Bl. Com. 109. Though they were religious persons, they were also secular, in which capacity, they were considered as natural persons, or bodies politic, and could purchase and hold lands, (Co. Litt. 94 a. b.; Perk. § 31, 35, 55, 51,) before the statutes of mortmain, and can now hold them in all cases where other corporations can. The capacity existed at common law, and was not taken away by the statutes of mortmain, where the uses and purposes were declared good by the statutes providing a remedy, or correcting abuses, which in the language of the supreme court, removed all obstructions and disabilities which in any way prevented the donation from taking effect, and restored them to their common law capacity. 4 Wheat. 31.

Charities were thus left free for the exercise of the jurisdiction of the respective courts, who in all cases gave effect to the disposition of a testator, whenever his intention was expressed, or could be collected from the will, notwithstanding any defect in form, or the want of naming or designating an object to take; they would give it locality, and application to those persons or bodies who were capable, if they could by any reasonable intendment be brought within the devise. As, in the church of Holborn case, they shifted the devise from the church to the parson, because the church could not hold in mortmain, but as the endowment of a vicar or parson was good by the 15 Rich. II., and divine service by the 13 Edw. I., and by 17 Edw. II., it was awarded to him, and he held an inheritance in right of the church as a capable person, the church in effect holding for his use; so, in the Reading case, they shifted the devise from the poor of the hospital, to the corporation which governed it.

The law looks to the substance of the gift, and, in favour of religion, vests

it in the party capable of taking it, (9 Cranch, 329,) but without the right to alien it. Wing. Max. 341, pl. 26. This consists in the enjoyment of the thing given according to the intent of the donor. Courts of common law and equity, were astute in devising means of giving it application and effect; whenever the instrument would pass the legal estate, either to the trustee or *cestui que trust* or use, they supported the charity; the mode of establishment, or the distribution, was a circumstance in which they would relieve, according to their respective powers, against any defects in the disposition by will or deed. Their action on charities was not, by any authority assumed from the necessity of the case, but the positive directions of the statutes, to execute and religiously observe the will of the donor, in the most ample and liberal sort, notwithstanding any defects or failures therein; the same rules were prescribed to the special tribunals and courts under whose governance charities were placed, and were applied as liberally in favour of a subject against the king, as between private persons. A donation to a charity, therefore, could only fail for want of a capable object, where there was neither a devisee to use, nor in trust, nor a *cestui que use*, capable of holding; they took effect whenever a trust was created and vested in any body or person who was named, described or could be brought within the scope of the will, and was capable of holding either as *cestui que trust* or trustee.

The cases in which these principles were established, were decided before the 43 Eliz., on prior statutes, or the rules of the common law; they have been approved and acted on by the supreme court of this state, in 17 S. & R. 91; 1 Penn. 51; and by the supreme court of the United States, in 9 Cranch, 43, 53, 328; 9 Wheat. 455–64; 2 Pet. 582; 3 Pet. 119; 6 Pet. 437; and the practical rules of construing the statutes of charities as laid down in 4 Wheat. 31, are those which are to be found in cases not affected by the 43 Eliz., as well as those within it.

The remedies for evasions of the statutes and the abuse or misemployment of charitable donations, were administered with the same liberality by courts of law before as after that statute; the equitable powers conferred on the courts which were to decide on claims for charitable uses out of the king's lands or revenues, evinces the favourable disposition of the king and parliament in their favour. The benign principles of the common law were never displayed in brighter colours than in the course of the courts in the exposition of the statutes of Hen. VIII., and Edw. VI., for the suppression of superstitious uses and religious houses; if any want of liberality has appeared in later times to have entered into the jurisprudence of England on charities, it has arisen from overlooking the provisions, or disregarding the principles of their ancient statutes, which contain all that is valuable in the system, or adapted to the institutions of this country. The statutes of mortmain, of superstitious uses, and the restraints on corporations, are exceptions from the general course of the law of England; legal excrescences which were forced into it by the policy of the times, during the existence of tenures in chivalry, the persecution of the catholic church, and latterly, since the statute 9 Geo. II., by a spirit of hostility to charitable donations by will, all of which are utterly repugnant to the spirit which pervades the common, the statute and the constitutional law of this state. There is no case reported as adjudged

by courts of common law against a gift to charity, where words of inheritance were used in a devise to private persons in trust, or for a use, or to any body or society, which had a head known to the law, as being capable of holding for any other use, by statute, charter or usage, local custom or prescription. Perk. § 510, refers to a case decided in 26 Edw. III., of a devise of a remainder to the brotherhood of Whiteacres in London, to find a chaplain to pray for the soul of the testator; the brotherhood was not incorporated or enabled to purchase, and the remainder was held void. Perkins thus introduces this case—"But the commonalty of a company which is not incorporated by the king's charter to purchase, &c., cannot take by devise;"—he states the case and concludes—"And know, that the chief and supreme officers of the fraternity, corporation or guild are taken in law for the best men," &c. These remarks lead to the ground of the decision. The devise was of a remainder, which could not vest without words of inheritance to private persons, or to a corporation by succession; in this case there being neither, the devise failed on the ground that the commonalty or brotherhood, having no politic capacity by means of a head or chief officer, could not hold an estate by succession, and no words of inheritance being used, the remainder in fee continued in the heirs of the devisor, according to the rules before laid down from Sheph. Touch. 235–7, &c. There was no franchise in the commonalty, from which a corporation could be presumed, as in the case from Bridg. Duke, 134, decided in 40 Edw. III.; the statute of Rich. II., authorizing the endowment of a vicar or priest, had not been passed, and by the words of the devise, there was no ground to infer the intention to be that any church or parish should take or hold it, by a parson, overseer or church-warden; so that there was no circumstance on which the court could lay hold to take the estate from the heir at law and give effect to the devisees as in the cases referred to in 9 Cranch, 328, &c. A learned judge considers this to have been a case which could have been aided by the royal prerogative exercised by the court of chancery, (3 Pet. 142,) but it appears to have been one where the king had no interest or claim by statute, prerogative or tenure; the devise not taking effect, the estate remained in the heir of the devisor. The charity was not extinct as in cases under the statute of Templars; it never existed, because there was no devisee in whom the remainder could vest; the king therefore could not make a new appointment by his sign manual, (7 Co. Rep. 36 a.,) nor could a court of chancery disturb the course of the common law, on any ground of equity; such a devise would not be aided in equity under the 43 Eliz., unless the brotherhood could be considered as a corporation by prescription, by some franchise or right to unite them. This case therefore cannot be considered as at all in opposition to those which have been referred to.

So far as the common law could be settled by the repeated solemn adjudications of the courts of Westminster Hall, we thus find it established from the time of Edw. III., without any clashing decision. It only remained to add the sanction of parliament to these principles of the law of charity by a declaratory act to make them irrevocable. That was done in the case of the Thetford school devise, which had been held valid in the two preceding cases, in 34 & 35 Eliz.; Croke Eliz. 288, and Poph. 6–8. This devise was made in 9 Eliz., when the annual value of the land was £35 per annum, it

afterwards rose to £100; a private bill was exhibited in parliament, 7 Jac. I., for the erection of the school, &c., according to the will, on which two questions were moved:—1. Whether the preacher, school-master, usher and poor should have only the said certain sums appointed to them by the founder, or that the revenue and profit of the land should be employed to the increase of their stipend, &c. 2. If any surplusage remained how it should be employed. The case was referred to the judges, and it was resolved, that the whole profits and revenue should be employed to the increase of the stipends, and if any surplusage remained it should be expended for the maintenance of a greater number of poor, and nothing should be directed to the use of the devisees, executors or heirs, or any private use, it appearing to be the intention of the testator to employ the whole in works of piety, charity, the maintenance and increase thereof, and the bill was passed accordingly. This was in accordance with the rule established in the statute *de templarium*, quoted by Lord Coke at the end of the case; so always that the godly and worthy will of the donors, &c., (8 Co. Rep. 130 b., 131 b.,) which was not a new rule introduced into the law by the act passed for the Thetford school, but as declared by all the judges in the case of Sutton's Hospital, in 10 Jac. I., was declaratory and explanatory of the common law; 10 Co. Rep. 30 b., 34 a. The right to take and hold the land devised for charitable uses with their increased revenues and profits being thus definitely settled by both the legislative and judicial power of the kingdom it has never been questioned since the case of the Thetford school, on which the statute 43 Eliz. had no bearing, and is not even referred to in the report of the proceedings in parliament or the opinions of the judges on the law of the case, as previously settled, in Croke Eliz. 288; Poph. 6–8.

The spirit of equity which pervaded the law of charities, having been extended so as to bring within its protection not only the specific bequests of a testator, but the entire fund on which they were charged, it was not necessary for courts of equity to usurp any of the powers of a court of law, in order to effectuate a charitable donation, or to establish any rules or principles different from those on which the common law courts had acted with the sanction of parliament. Chancery had its appropriate jurisdiction over cases of fraud, accident and breach of trust, arising out of dispositions of property to purposes unconnected with charity; if the party had a right known to the law, but had no legal remedy, he could resort to the extraordinary powers of the court of chancery for relief, according to its usage and settled principles, which applied to charities as well as other subject matters of its cognizance. To have refused the same relief in the one case as the other, would have placed charities under the ban of the law of equity, though they were the favourites of the statute and common law: if there was any thing in the nature of charities, which would call for or justify the withholding equitable relief for matters not cognizable at law, without special authority by statute, it would have appeared in the course of the law for more than three hundred years before the 43 Eliz. Its history exhibits no feature of the kind; on the contrary, it exhibits the most convincing evidence, that it was peculiarly the duty of courts of equity to obey the injunctions of the statutes, to execute the intention of the donors and founders of charities, and not to suffer their dona-

tions to fail of effect, or to be abused when their intention could be ascertained.

The proceedings of courts of equity are very imperfectly reported prior to the restoration; some few cases are interspersed among the common law reports, but they are mostly referred to in the short notes of Carey and Tothill, which do not give the reasons of the court for their decisions; we are therefore left to infer the principles which governed them from their acts, thus briefly noted, and the elementary writers in or near the time, who have given the results in general terms. Enough, however, can be collected to show satisfactorily, that the general course of equity before the 43 Eliz. in all cases of charities, was according to rules and principles as well settled and defined as on any other subjects, and was the basis on which the law now stands on the construction of that statute.

The jurisdiction of chancery over trusts was never questioned by the most strenuous advocates of the common law; 2 Bacon Abr. 22; Harg. L. T. 431; Treat. Eq. 523; 2 D. C. D. 764. It was coeval with their existence, and its exercise was indispensable in cases where the feoffor, having parted with his whole estate, had no control over it at law; but being made in trust and on confidence, the powers of a court of equity were necessary to deal with the corrupt conscience of the feoffee who refused to execute the trust—the cases of its exercise from the time of Hen. VI. are numerous; 4 Co. Inst. 84; Gilb. Ch. 19, 259; Bohun C. C. 6; 1 Hu. Ab. 400; Lilly Pr. Reg. 57–8; 1 Roll. Abr. 374; Mitf. Pl. 120–1.

The equity and use of the land being to go according to conscience, the subpœna for relief herein in this court is given accordingly. Sheph. Abr. 201, pl. 13, 199. Chancery would not only compel the performance of the trusts specified, but compel the feoffee to do any other acts for the benefit of the feoffor or *cestui que use* in a deed or obligation. Bro. Conscience, 5, 9, 27, fo. 162–3; Carey, 13, 20, cites cases from the time of Hen. VI. and Ed. IV. It also remedied grievances arising from acts done which were prohibited by statute, but for which there was no remedy by the common law, as waste in certain cases. Car. 26; Moore, 554, pl. 748; Fonb. 32.

All cases of covin and fraud were cognizable in equity, from the earliest times. Toth. 62; Car. 20, 25–6; 4 Vin. Abr. 487; Bro. Conscience, 8; Moore, 620, pl. 846. The performance of verbal promises in temporal matters; Bro. Conscience, 14, fo. 163; Tr. Eq. 45. The specific performance of contracts made by competent parties, on good consideration, were also decreed against the party, his heir, and those claiming under him with notice. Toth. 3, 4, 62, 69, 70, 92, 123, 106; Cro. Car. 110; Tr. Eq. 5; 2 Day's Com. Dig. 772.

"Equity will aid the perfecting of things well meant, and on good consideration," and "will reform in conscience that which is badly done," by supplying defects; Car. 23, cites 9 Hen. VIII.; Max. Eq. 57; 10 Hen. VII. 201, pl. 13. It will prevent a contract from failing for want of a circumstance or ceremony, (Carey, 24–5,) as livery of seisin, attornment, surrender of a copyhold, enrolment of a deed, a misrecital; (Toth. 62, 12 Eliz. 79, 38 Eliz.,) or a misnomer of a corporation; Toth. 131, 32 Eliz.; Car. 24, 44; Bohun C. C. 7; Max. in Eq. 57; Toth. 27, 33 Eliz.; Sheph. Abr. 194–5; Hob. 124; Cro. Eliz. 106. Though an estate cannot be created by covenant by law, it shall be made

good in chancery; Toth. 84, 40 Eliz. So of a lease made to commence during the existence of a former one which would make it void at law. Toth. 127, 25 Eliz.; S. P., 128, 40 Eliz. So where an exception was intended to be made, but it was omitted by mistake, chancery supplied it. Toth. 131, 37 Eliz. So where a devise was void at law, by misrecital of a grant and by reason of an attornment; (Toth. 79, 38 Eliz.,) or a copyhold surrendered at a court held out of the manor where the land lay; (25 Eliz., Toth. 45,) or a conveyance sought to be avoided for want of livery; (Toth. 42, 41 Eliz.,) chancery will relieve, though the defect would be fatal at law. Where courts of equity act upon instruments to take effect in the lifetime of the party who makes an agreement for a valuable consideration, they will make it as effectual for the purposes intended as the party had power to do; (Sugd. Pow. 361,) and in dispositions by will, they will help against all defects which the testator had power to remedy. 1 Mad. Ch. 47–9. The principle on which they act is, that where the parties interested intended to contract a perfect obligation, though by mistake or accident they omit the set form of words, so that there is no legal remedy, yet they are bound in natural justice to stand to their agreement, and "where there is substance, the law will apply the words to the intent, though they sound differently." (Tr. 14; 1 Fonb. 147; Plowd. 140–1,) the imperfect execution of the contract not affecting the equity raised by the agreement. 1 Fonb. 37, 40, 41. Equity, therefore, will supply any defects of circumstances in conveyances; (1 Fonb. 38,) where there is an intent to make a better assurance. Carey 44.

It has never been pretended that the course of equity on these subjects was regulated or in any way affected by the 43 Eliz.; it was founded on principles which were the origin and foundation of its jurisdiction, and became gradually developed according to the exigency of the times. There is no reason which would prevent their application to charities in all cases between subjects, before the 43 Eliz. in the same manner as after; nor is there to be found in any decision or authority, other than the late *dicta* denying it: so far as any traces of its jurisdiction over charities are to be found in the books, it seems to have been under the three heads of fraud, trust and accident, and exercised without any doubt of the power in all cases where either circumstance existed.

In Toth. 58, a case is reported as having been decided in 36 & 37 Hen. VIII. in which the court of chancery decreed lands to the mayor and burgesses of Gloucester, to whom they had been devised for the use of a school and other purposes. When a donor appointed lands or goods to be sold to maintain a charitable use, and did not appoint by whom the sale should be made, it was decreed to be made by persons named by the commissioners, and the money employed to maintain a charitable use according to the donor's intent. Toth. 30; Duke on Charitable Uses by Bridgman, 360, 41 Eliz. In Sir Francis Moore's reading on the 43 Eliz., various cases are referred to which show clearly that charities stood upon the same footing in equity before the statute as they have done since. If a man devise that the executors of his wife shall pay money to be lent to young tradesmen, it is void, because he cannot charge the executors of his wife; but assets belonging to the husband were decreed to be liable to the charitable use. Duke on Charitable Uses,

by Bridgman, 136, 40 Eliz. Land sold in confidence to perform a charitable use, which the bargainor declared by his will, the bargain was never enrolled, yet the lord chancellor decreed the heir should sell the land, to be disposed according to the use. This decree was made 24 Eliz., before the statute of charitable uses, and "was made upon ordinary judicial equity in chancery, and therefore it seems the commissioners upon this statute may decree as much in the like case." If a reversion be granted to a charitable use, the particular tenant shall be bound to attorn by the decree of the commissioners, and it was said there are precedents in chancery where the lord chancellor had decreed and compelled the tenant to attorn. Sir Thomas Bromly decreed and compelled the terre tenant to give seisin of a rent seck to the intent the party may bring an assize. Duke on Charitable Uses, by Bridgman, 163.

From these cases, and the remarks of Sir Francis Moore, it seems that the course of the commissioners and the chancellor, under the statute, was taken from the previous rules of judicial equity, which were settled long before its adoption; it was penned by him by order of the house of commons, (Duke on Charitable Uses, by Bridgman, 122,) which gives great weight to any opinion expressed by him, and to cases which he adopts as law. He says, no use shall be taken by equity to be a charitable use, within the meaning of the statute, if it be not within the meaning and words of the statute; but the words may be construed by equity, as the repairs of churches extend to all convenient ornaments, and convenients for the administration of divine service. A gift of lands "to maintain a chaplain or minister to celebrate divine service, is neither within the letter nor meaning of this statute, for it was of purpose omitted in the penning of the act, lest the gifts intended to be employed upon purposes grounded upon charity might, in change of times, contrary to the minds of the givers, be confiscated into the king's treasury; for religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox, may, at another, be accounted superstitious, and then such lands are confiscated, as appears by the statute of charities," 1 Edw. VI., ch. 14. The effect of this omission is not to make the devise void, but to except such cases from the jurisdiction conferred on the commissioners by the statute. It is the same as a proviso which declares that nothing in the act shall be construed to extend to colleges, &c., which is only to exempt them from being reformed by commission. Hob. 136. So a gift for the maintenance of a chaplain or priest for divine service, will be a charitable use, and in the direction of chancery, though not within the power of the commissioners; 7 Day's Com. Dig. N. 10, p. 609, and cases cited. As the statute gives to the chancellor no judicial power, except by appeal from the decree of the commissioners, it follows, that wherever he exercises any jurisdiction over cases not within the statute, or excepted from the power of the commissioners, it is independent of the statute; yet the uniform course of equity in such cases, has been to give relief by the same rules and principles as if the case had been included in its enumeration. The lord keeper and the judges decreed, that money given to maintain a preaching minister, was a charitable use, notwithstanding it is not warranted by the statute, and that the same should be paid by the executor to such maintenance. *Pember* v. *Kington*, Toth. 34, 15 Car. I.; Bridg. Duke, 381, *Penstred* v. *Payer*. Where an

endowment was made for a vicar, but was void at law by reason of some defects arising from the ignorance of the donor, it was decreed good in chancery; "For in cases of charitable uses, the charity is not to be set aside for want of every circumstance appointed by the donor,—if it should, a great many charities would fail." Nelson Rep. Ch. 40–41, 15 Car. I., *Joyce* v. *Osburn*. So, where by will a certain sum was charged upon land for a weekly sermon and lecture, it was objected, that the devise was void, "because the case was not in the statute," because "no person was named,"—"part of the land was held *per autre vie*, and not devisable,"—and, "as the sermons had been discontinued, therefore the annuity ought to cease;" but the chancellor held them to be good. 2 Ch. Cas. 18–19; S. P., 32.

This principle has been followed up by various cases, in which devises to chaplains, ministers, preachers, vicars, &c., have been held good, (1 Vin. Abr. 249; 2 Vern. 105; 3 P. Wms. 344; Swinb. 71,) and chancery has decreed the execution of trusts in their favour, without any other authority than that on which they, through all time, acted on matters within their appropriate jurisdiction. 2 Fonb. 210. It was strongly illustrated in a case decided immediately after the statute. In 11 Hen. VI., land was given with intent to find a chaplain to celebrate divine service, until the feoffor should procure a foundation, but was not so employed; the commissioners under the 39 Eliz. decreed the lands to the use,—the chancellor reversed their decree, because the use was not inquirable by them under the statute, but by his chancery authority he did decree the land according to the original use. Bridg. Duke, 154; Carey 39; 3 Jac. I. A decree was made for the heir at law, against certain feoffees who had lands conveyed to them to maintain scholars who should use holy orders. Toth. 61–2, *Crofts* v. *Crofts*, 3 Jac. I.; though this case is not within the statute.

The general principle adopted in chancery, that the performance of a charitable use is equally if not more favoured than the payment of debts, (Bridg. Duke, 138, from Moore's Reading on the Statute, referred to as laid down in 42 Eliz.,) shows the reason of these decisions to be founded in general rules, to carry the intention of the party into effect, for all lawful objects, especially favoured ones, as is forcibly expressed in a note in Tothill, of a case decided in 38 & 39 Eliz. "The law of God speaks for him, equity and good conscience speak for him, and the law of the land speaketh not against him." Toth. 126. This is the basis of equity jurisdiction; and as there is no subject to which the rule would apply with more force than to charities, so it will be found, that it has been the uniform course of equity to support charitable donations in all cases where they were not prohibited by law;—the inquiry has been, not what uses were authorized, but only what forbidden. Courts of original jurisdiction have taken cognizance of cases excluded from the power of special tribunals, without any statutory authority, and have not considered charities to be excluded from the protection of the law of equity, because they were not made subject to the power of the commissioners under the 43 Eliz. It contains no provision which enlarges the jurisdiction of the chancellor, as a court of equity, or as acting in place of the king by his prerogative or personal jurisdiction; in the appointment of commissioners, he acts as a special officer, selected to perform the duty imposed by the statute;

in sustaining appeals from the commissioners, he acts by the rules of equity and good conscience, and these are the only functions which he is to perform under the statute. Keb. 943–4; 2 Ruff. 708–9. It is wholly silent as to a proceeding by original bill, between private parties, or by information of the attorney general, where the king is in any way concerned, or where the chancellor can act only by the sign manual of the king. It enumerates only twenty-one charitable uses, as classed by Lord Coke, in 2 Inst. 710, and prescribes only one rule to the commissioners in making their decrees: "So as the lands and money may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned or appointed, by the donors and founders thereof;"—"which decrees not being contrary to the orders, statutes or decrees of the donors or founders, shall, by the authority of the present parliament, stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the lord chancellor," &c. 2 Co. Inst. 710.

This is the substance of the recital and remedial part of this statute; and if the law of charity could be traced to no other source, the system must have remained not only very defective, but would have been extremely illiberal and contracted, if it had rested on the enacting or remedial provisions it contains, or its operation and effect had been confined to the enumerated cases. By recurring to the statutes heretofore noticed, and the decisions of courts of law and equity, before this statute, it will be found, that they comprehend forty-six specifications of pious and charitable uses, which were recognised as within the protection of the law, in which were embraced all that were enumerated in the 43 Eliz. The statutes of Hen. VIII. and Edw. VI., for the suppression of superstition, protected more cases of charity, and prescribed more liberal rules for their establishment and maintenance, than the 43 Eliz. The rules they prescribed to the commissioners, and the courts under which they were placed, are more definite and explicit in favour of charities, even where their establishment would prejudice the rights of the king, than this statute directs in cases between individuals.*

* The following summary list of uses declared by statute and adjudged cases to be valid, as pious and charitable, for which property could be held prior to the 43 Eliz. will fully sustain this position. 1. Gifts for the exercise and celebration of divine service, to find a chaplain, a taper to burn before an image, prayers for souls, the defence of the church, obits, or service of a priest. St 13 Edw. I.; 17 Edw. II.; 2 Hen. V.; 23 Hen. VIII.; 15 Rich II. 2. Free alms, liberal alms-giving and relief of the poor. 13 Edw. I; 17 Edw. II.; 37 Hen. VIII.; 1 Edw. VI.; these were gifts in franckalmoigne, and were good at common law. Litt. § 133; Co. Litt. 93 b. 94 a. &c; 6 Co. Rep. 17; Carey, 39; Bridg. Duke, 154; Poph. 6; 8 Co. Rep. 130; And. 43; Hob. 124; Plowd. 523; Perk. § 7. 3 Hospitalities. 17 Edw. II.; 15 Rich. II. 4. All other offices and services before time due, by whatever name. 17 Edw II. 5. The employment of a vicar to inform the people, &c. 15 Rich. II. 6. Lazars in hospitals. 2 Hen. V. 7. Men out of their wits. 2 Hen. V. 8 Poor women with child, nourishing, relieving and refreshing other poor people. 2 Hen. V., 1 Co. Rep. 26 a. 9. The discharge of tolls and tallages to be levied to relieve the poor. 23 Hen. VIII; 1 Co. Rep. 26 a. 10. The cleansing of streets. 23 Hen. VIII. 11. Good, virtuous and charitable deeds. 37 Hen. VIII. 12. Erecting grammar schools and the maintenance of schoolmasters; 1 Edw. VI.; Dyer, 225; 1 Co. Rep. 25; and ushers. Poph. 8; 8 Co. Rep. 130 b. 13. The further augmentation of the universities. 1 Edw. VI. 14. The support of preachers, priests and vicars; 1 Edw. VI.; and parsons. Plowd. 523; 1 Co. Rep. 26. 15. The maintenance of pier walls and sea banks. 1 Edw. VI. 16. The relief of poor men, being students or otherwise. 1 Edw. VI. 17. Repairing bridges and walls. 2 & 3 Edw. VI.; 1 Co. Rep. 26 a. 18. Setting poor people at work. 5 & 6 Edw. VI.; 1 Co. Rep. 26 a. 19. The resuscitation of alms, prayer, and example of good life.

The same remark applies to the statutes of the 39 Eliz., and if a detailed comparison was made, exhibiting the system of charities by the general course of the law of England, as it stood before the 43 Eliz., and as it would appear from that statute taken alone, no jurist would hesitate in preferring the former as the most perfect and liberal. The contrast would be striking indeed, if we expunge from the latter all which it adopts from former statutes and the common law; or if we take from the rules and principles which have governed its construction, as they are stated in the books to have been founded on its provisions, those which appear to have been finally settled and established previously;—this statute and the great system which has been supposed to have been built upon it, would lose its importance in the view of the profession.

That branch of the personal or prerogative jurisdiction of the chancellor, which is exercised on the information of the attorney general, by appointing a charitable donation to new objects, on the extinction of those to which it was originally devoted, will be found to be derived from the fundamental law of charities, established by the statute of Templars, 17 Edw. II.

The altering and disposing to good and pious uses, donations originally made for purposes of superstition, is a provision of the 1 Edw. VI. The appointment of general and vague charities to definite objects, results from the general direction of the statutes, prior to the 43 Eliz., to make such appointments, "so that the will of the giver shall in all things always be faithfully

1 & 2 Ph. & M. 29. The relief of prisoners. 14 Eliz.; Bridg Duke, 131. 21. The repair of churches. 13 Eliz.; Cro. Eliz. 449; 1 Co. Rep. 26 a. 22. The maintenance of poor in houses of correction. 29 Eliz. 23. For impotent and maimed soldiers. 29 Eliz.; 35 Eliz. ch. 1. 24. For hurt and maimed mariners. 35 Eliz. ch. 1; Mo. 889, pl 1252. 25. The maintenance of houses of correction and abiding houses. 35 Eliz. ch. 7; 39 Eliz. ch. 5. 26. For stocks and stores for them, and the use of the poor. 39 Eliz. ch. 4; 1 Co. Rep 26 a. 27. To erect and found hospitals. 39 Eliz. ch. 5; Co. Litt. 342 a.; 10 Co. Rep. 25, &c. Hob. 123; Toth. 32; Mo. 865, pl. 1194. 28. Schools of learning, colleges and hospitals, for the relief of the poor. 39 Eliz. ch. 6. 29. For the relief of orphans and fatherless children. 39 Eliz. ch. 6; Swinb. 66. 30. And such like good and lawful charities. 39 Eliz ch 6. 31. Repairing bridges and roads; 39 Eliz. ch. 6; making bridges and beacons. 6 Co. Rep. 1-2. 32 Maintenance of free schools and poor scholars. 39. Eliz. ch. 6. 33. Or such other good, lawful and charitable purposes and intents. 39 Eliz. ch. 6. 34. The true labour and exercise of husbandry. 7 Jac. I. ch. 3, preamble; Keb. St. 1040; 3 Ruff. St. 74, recited as profitable to the commonwealth and pleasing to God. 35. The bringing up of apprentices of both sexes in trades and manual occupations. 7 Jac. I. ch. 3. 36. The making a stock for poor labourers in husbandry—poor apprentices, and to set them at work. 1 Co. Rep. 26 a. 37. For chapels of ease, erected as members of parochial churches. Hob. 123-4. 38. For erecting cathedrals—of money for their support. Swinb. 66. 39. For the advancement of religion and learning, and the maintenance of the poor. 11 Co. Rep. 70 b. 40. For public benefit. 11 Co. Rep. 73 b. 41. Works of piety and charity, or any other charitable use. 1 Co. Rep. 26 a.; 8 Co. Rep. 130 b. 42. Poor men decayed by misfortune, or the visitation of God. Mo. 129, pl. 277. 43. Persons imprisoned for conscience sake. Bridg. Duke, 131. 44. A bell for a church, pulpit cushion and cloth, for a session house, or for the ornament of a church, or vestments for service. Popb. 139; 6 Co. Rep. 1-2. 45. The marriage of poor maidens. 1 Co. Rep. 26 a.; 6 Co. Rep. 1 b., 2 a. 46. For any charitable use; 1 Co. Rep. 26 a.; Shep. Abr. 1066; and such uses as concur in decency and good order with the intent of the founder. Bridg. Duke, 155.

The twenty-one cases enumerated in the statute 43 Eliz. are the following:—1. The relief of aged, poor and impotent people. 2. The maintenance of sick and maimed soldiers and mariners. 3. Schools of learning. 4. Free schools. 5. Scholars in universities. 6. Houses of correction. 7. Repairs of bridges. 8. Of ports or havens. 9. Of causeies. 10. Churches. 11. Of sea banks. 12. Of highways. 13. For education and preferment of orphans. 14. For marriage of poor maidens. 15. For supportation, aid and help of young tradesmen. 16. Of handicraft-men. 17. Of persons decayed. 18. For redemption or relief of prisoners or captives. 19. For ease and aid of any poor inhabitants concerning payment of fifteens. 20. Fitting out soldiers. 21. And other taxes.

observed and religiously executed;" (17 Edw. II.,) and that the decrees "shall be most beneficial in favour of the charities specified;" (1 Edw. VI.,) so that the said charitable uses may be observed in the most liberal and ample sort. 39 Eliz. General charities are embraced in the 37 Hen. VIII. as "good, virtuous and charitable deeds;" and in 1 & 2 Ph. & M., "the resuscitation of alms, prayer and example of good life;" and in 39 Eliz., ch. 6, "other good, lawful and charitable purposes and intents;"—they were also under the superintendence of the king, as *parens patriæ*. So that in all these cases, the 43 Eliz. has no direct or indirect effect in giving any jurisdiction to the chancellor. The appropriation of the increased profits and revenues of land charged with a specific sum to charities, to the same objects as those specified; and the rule which prevents their going to the heir, or any other use than the charity, is founded on the statute of templars, and the common law, as declared in 8 Co. Rep. 131; 10 Co. Rep. 30.

The words "given," "limited," "appointed," "assigned," were taken from the 1 Edw. VI. ch. 14, and 37 Hen. VIII. ch. 4, (2 Ch. Cas. 18,) these are the words on which the effect of the statute has been mainly founded, and courts have extended them very far; (P. C. 271,) but their meaning is the same in all the statutes. An assignment of the suppressed lands to charitable uses by commissioners, under the statute 1 Edw. VI., ch. 14, § 13, had the same effect as an act of parliament, and the final decree of the court of augmentations of the revenue, the court of wards, or exchequer, establishing a charity on the lands or revenues of the king, was conclusive on his rights, let them accrue from whatever source: it followed that such appointment, assignment or decree, by the authority of parliament, had all the effect of a charter, license, and *non obstante statuto*, or special incorporation.

Independent of any statutory jurisdiction, charities belonged to the king as *parens patriæ*, and fell under the care of chancery by the same authority which they exercised over infants, idiots, lunatics and wards of the king, before the erection of the other courts to whom the powers of the chancellor were transferred. 2 Vern. 342; 2 P. Wms. 103–18; 1 Bl. 90–2; 2 Bl. 328; Gilb. Eq. R. 172. The erection of new courts, or the authority conferred on commissioners to do what had before belonged to the chancellor, *virtute officii*, or by sign manual, was therefore only a devolution of his powers on the other tribunals; not the creating of a new power not before in existence, nor was the effect of their acts any greater by their special authority than the decrees of the chancellor, in virtue of his inherent or prerogative jurisdiction.

The law on this subject was so well settled, that in the 43 Eliz. the attorney general, Coke, and the two chief justices, Popham, Sir Francis Moore, and Anderson, by command of Sir Thomas Egerton, keeper of the seal, reported the following resolutions, on divers points on the 39 Eliz., ch. 6, directing commissioners to redress frauds and breaches of trust of lands and goods given to charitable uses. If the commissioners decree a lease or feoffment to be void, it is void in interest and estate. If the chancellor decrees it good, it is again good interest, but they thought that the chancellor could make no decree, unless the decree of the commissioners was against equity. That the commissioners could decree the payment of mesne profits received and misemployed, as well as make orders for the future profits. That the word

"given," in the proviso excepting hospitals and towns corporate, extends to gifts after the statute, as well as to gifts before. That they could not by a decree, establish a corporation of church wardens, or others, to take for a charitable use, but they could decree land to a capable body politic, without danger of mortmain, whether the land was held *in capite* or not, because the king is bound by the statute in that point. That they could appoint lands to natural persons, and their heirs to hold in continuance for charitable uses. That they had power to reform abuses in such corporations as were out of towns corporate, to add land to them, or make orders for them which should have the same effect, as parliament, by private acts of incorporation for charitable uses, gave, as to all things in which the law does not prescribe any special cause or favour. Moore Rep. 559–60, pl. 762; Moore Abr. 158, pl. 727. There can be no danger or error in taking the resolution of these common law lawyers, as the settled rule by which charities were administered up to this time; there certainly is none in following the statutes which are yet in force, and the adjudications of courts which are recognised as law to this day, as the "general course of the law of England." In thus divesting the 43 Eliz. of its borrowed words, uses and provisions, it will be found that there remains but one important office which it has performed by its exclusive operation in aid of donations to charities—that is, to remove the disability imposed on corporations by the statute of wills.

In other respects, it can be considered only as an item in the legislature of England, which, taken in connexion with the decisions of the courts, framed the general course of the law on the subject of charities, which had become well defined and systematized; so much so, that we find much less litigation on charities before the 43 Eliz., than immediately afterwards. This was the consequence of the repeal of the 39 Eliz., ch. 6, and the very limited enumeration of uses in the 43 Eliz., which compelled the courts virtually to re-enact it by construction. In addition to the preceding view of the jurisdiction of chancery over charities, there is a general principle of the law of England peculiarly applicable to this subject.

It is provided by an old statute, that no man shall go from the king's courts without remedy for his right; (13 Edw. I., ch. 50; Keb. St. 52; 1 Ruff. St. 111–12,) and was declared as a rule of equity by the chancellor, in 4 Hen. VII., fo. 5; Bohun's Ch. Cas. 3; 2 Co. Inst. 405–8, 485; 12 Co. Rep. 114 b.; Hob. 63; 3 Bl. Com. 52; 2 Day's Com. Dig. 340–68–70; 1 Ch. Rep. App. 20, 48. The whole judicial power of the kingdom is vested in the different courts, (4 Co. Inst. 70–1,) and there can be no failure of justice by defects of courts, for when particular courts fail of justice, the general courts shall give remedy. 4 Co. Inst. 213; 1 Bac. Abr. 554–5; 12 Co. Rep. 114. They are supreme within their respective jurisdictions, and that of equity extends to all rights recognised by the law for which there is no legal remedy, the cognizance of which has not been transferred to some other court; 4 Co. Inst. 84. The jurisdiction of chancery, according to equity and good conscience, extends to all cases cognizable in equity, and the party objecting to its exercise must show that some other court of equity has cognizance of the case; 4 Co. Inst. 82; 1 Bac. Abr. 560; Mitf. Pl. 183; Beame, 57, 91; 2 Vern. 483; 1 Vern. 59; 1 Ves. 204; Dick, 129.

[Magill v. Brown.]

Its course is governed by usage, without any statutory restraint as to persons or the subject matter—except cases affecting the rights or prerogative of the crown, to which it is extended either by statutes or warrant from the king; but is not exercised in virtue of the equity powers of the court; (4 Co. Inst. 79, 82; Bohun's Ch. Cas. 56; Hob. 63; 2 Atk. 553; 3 Atk. 635,) or the 43 Eliz.; 2 Co. Inst. 552. In acting on cases between subjects, the jurisdiction exercised is that which is inherent in chancery as a court of equity, depending on its usage, and co-existent with its existence, by the same rules as are prescribed to the chancellor on an appeal from a decree of the commissioners under the 10th section of the 43 Eliz., which adopted its old principles.

It is the same jurisdiction which the constitution confers on the courts of the United States, by the words "cases in equity," and which the laws of this state of 1825 and 1828 confer on the state courts in cases of trusts, "according to the powers and rules of a court of equity," which this court can exercise to the same extent as in England; subject only to the restriction of the 16th section of the judiciary act, where there is a remedy at law; *Baker* v. *Biddle*, C. C., MSS.; 3 Pet. 446–7; 2 Pet. 525–6. It is therefore clear, that the extraordinary jurisdiction of chancery was always applicable to charities in England; whenever there was a right to hold property for a charitable use, there was a remedy in the appropriate court, according to their respective jurisdiction, to be administered by its ordinary rules and principles without the aid of any new statute. It is also clear, that the personal or prerogative jurisdiction of the chancellor existed before the erection of the court of Wards, (2 Atk. 553,) and that the court of chancery exercised its jurisdiction at large on cases of charitable uses before the statute, and that there may be a bill by information in that court founded on its general jurisdiction; 2 Ves. 327–9.

There is no case reported or referred to, wherein chancery has refused to sustain a bill or information for the establishment of a charity for the want of jurisdiction; there could be no failure of equitable relief in a proper case, either between a subject and the king, or subject and subject, for before the erection of the courts of augmentations and wards the chancellor was invested with all the powers which were given to those courts which were most ample for all purposes of charities.

The case of the *Queen* v. *Porter*, in 1 Co. Rep. 22, has been considered as opposed to this position, and the importance given to it by the supreme court of the United States, in 4 Wheat. 33–4, makes it necessary to bestow some attention upon it. The case is too familiar to the profession to be stated, but one historical fact is stated by the Lord Chancellor, in 3 Ves. Jr. 726, which fully accounts for the course of proceeding—the devisee "instead of performing the will made a long lease, and the mode taken to effectuate the charity was this—they found the heir at law, and he having entered, conveyed to the queen, by which means she had it in her power to establish the charity." The attorney general filed an information of intrusion in the Exchequer against Porter, who was in possession under the devisee, on which there was a judgment in favour of the queen, which is equivalent to a recovery of possession, as the defendant in such cases is subject to a fine which he can avoid only by making terms; it only remained for the queen to grant a charter to effectuate the charity, as she had the legal estate by deed from the heir, and

possession of the land on which it was charged; and it was the most direct mode of doing it. In any other way the difficulty would have been great. There had been an adverse possession from the death of the testator, in 32 Hen. VIII., till the 34 Eliz., so that the heir could not have recovered possession by any other proceeding than a writ of right; if successful, he could establish the charity by his own deed, only in the grantees and their heirs, or in trustees for their use. To make a corporation, it would be necessary to apply to parliament, as in the case of the Thetford school, or to the queen for letters patent, for at this time there was no power in commissioners by any statute to establish charities on any lands except those in the king's hands under the government of special courts. If the heir had refused, the interference of chancery would have been necessary to give relief to the parties interested in the charity, if the difficulty of obtaining possession at law had been removed. By the special verdict, it appears that the testator had edified "divers meases, mansions and places convenient for a free-school," &c., (1 Co. Rep. 19 b.,) and the devise of the wharf and house was for "the maintenance of the premises in manner and form, as the said N. G. have kept and maintained the same, and as the same is now kept and maintained without any diminution in any wise." There was then a vested interest, a trust created, and *cestui que trust* in existence, and the charity was fastened on the land into whosesoever hands it came. It was binding on the heir who entered for the condition broken—"he shall perform the use because he comes in upon confidence, and the condition was compulsory to perform the use." Moore on Charitable Uses; Duke on Charitable Uses, by Bridgman, 137–8, 159–61.

If the powerful reasoning of the judges in the case of *Inglis* v. *The Trustees*, &c., 3 Pet. 119, 140, 145, 154, is applied to Porter's Case, it is apprehended that there could be little doubt that the devise would have been carried into effect in a court of law, if the *cestui que use* of the charity had been in possession of the wharf and house; as the court of exchequer held the devise to be valid in law, and as the donor had an undoubted power over the estate, every principle and rule of equity would have induced a court of equity to compel the heir at law to have carried his intention into effect, by the exercise of its acknowledged jurisdiction over trusts. The queen by her purchase acquired only the right of the heir, she held it subject to the trust, and as the condition which created the trust appeared on the face of her title, the *cestuis que trust* could have had their remedy in the exchequer, by a bill or information in nature of a *monstrans de droit*, as fully as in the case of a charity charged upon the abbey lands by the 33 Hen. VIII. But no further proceeding was required after the adverse claim was removed; as the object was the establishment of the charity, no interference became necessary, as the power of the queen was competent to do every act in order to carry the devise into complete effect; by the mode adopted all circuity was avoided, and the object completely effected, as soon as the queen obtained possession by removing the intruder. Plowd. 561; Hard. 460; 7 Day's Com. Dig. 83.

The presumption of the want of any equitable remedy to establish and protect the charity, which has been drawn from the lapse of time from the death of the devisor till the filing of the information, is not warranted by any

thing which appears in the report of the case, and it is not to be expected that the collateral circumstances attending it can now be traced with accuracy; the one referred to in 3 Ves. 726, is satisfactory, and appears in the whole course of the argument by the counsel of the queen, to have been the only object of her interference. But whatever ground there may have been for such presumption, arising from the particular circumstances of Porter's Case, without referring to the general course of the courts of law and equity, or of the special courts or tribunals instituted by statutes prior to its decision; there certainly is the most abundant evidence that there was in some court a competent power to effectuate all lawful charities according to the intent of the donor.

The statutes and adjudications referred to are conclusive to this point, and no presumption can be permitted to overthrow their authority, unless modern doubts shall be more respected than the ancient principles of the law which governed charities before the 43 Eliz., and which have continued to this day the rules by which courts of equity have proceeded in their administration in cases not within the words or equity of that statute, as well as those expressly excluded from its operations by provisos and exceptions, as to which there can be no pretence that the statute either gave any new, or enlarged any old jurisdiction.*

There is a large class of cases expressly excepted from the jurisdiction of the commissioners by the 43 Eliz., by declaring "that this act, or any thing in it, shall not extend to any city, town corporate," or land in them, given to the uses specified, or to "colleges, hospitals or free-schools," who have special governors or visiters to govern them, to "colleges in the universities of Westminster, Eton or Winchester." 7 Day's Com. Dig. 616, N. 19.

The 39 Eliz., embraced all "colleges, hospitals, schools of learning and other places founded or ordained for charitable purposes," but it was repealed by the 43 Eliz., ch. 9; 4 Co. Inst. 167; 7 Day's Com. Dig. 614. Yet, notwithstanding the repeal of this law, and the proviso in the 43 Eliz., ch. 4, chancery has since, as they had done before, exercised a jurisdiction over them, which continues to this day, without any statutory authority, resting on its ancient basis. 2 Fonb. 208. Though the 2 Hen. V. placed hospitals under the supervision of the ordinary, yet where the "king or any of his progenitors were founders," the ordinary was not allowed to visit them; "but the chancellor of England is appointed by law to be their visiter." Co. Litt. 96 a. The king may have a prohibition to the ordinary that "he shall not visit them, because the chancellor ought to do it and no other," "so shall a private founder, if the ordinary will visit or cite any of the poor to appear before him or remove them." F. N. B. 42, 93; Reg. Br. 40; 1 Lilly Pr. Reg. 379.

The remedy must, of course, be in the temporal courts; if a resort is had

* The law of charitable uses has always formed a part of the civil code of Pennsylvania; the statute of 43 Eliz., as a statute, has never been adopted in this state; but its conservative provisions have been in force here, by common usage and constitutional provision; not only so, but the more extensive range of charitable uses which chancery sustained before the statute of Eliz., and even beyond it. The statute of 9 Geo. II. never was in force in Pennsylvania, and consequently the law of charitable uses here stands unaffected by it. The courts of equity in this state will not hesitate in supplying any formal defect in the execution of a power by will, in favour of a charity. *Pepper's Estate*, 1 Pars. Eq. Cas. 436.

to those of equity powers, it must be by ordinary process of a bill at the suit of a subject against subject, or by information in case the king is party, according to its ancient usages and rules, that wherever property is holden by one in trust and confidence, chancery has jurisdiction to correct fraud, accident and breach of trust. This power is exercised over the governors and visiters of colleges, hospitals and corporations, whenever they are trustees. 3 Atk. 108, 164; 2 P. Wms. 325.

Though the jurisdiction of the ordinary is expressly saved by the statute, chancery exercises the same powers over executors and administrators who hold money for charitable uses, as other trustees. It is the existence of a trust which is executory that gives jurisdiction to chancery, and not the existence of a charity recognised by a statute; a statute has a different office to perform, to remove disabilities or incapacities, imposed by statute or common law, so as to bring charities back to their original capacity, and place them within the cognizance of the appropriate courts, as if they had never been affected by any change introduced by statutes, which had embarrassed donations for uses of charity, piety and education. When that office is performed, and the case becomes disencumbered of statutory restraints, the powers of the courts are brought to act on them, as the highly favoured objects of the law; chancery especially will protect them to the extent of its judicial power as a court of equity; and, by the personal jurisdiction of the chancellor, (which he exercises in right of the crown by prerogative, under the sign manual of the king, as *parens patriæ*,) do what the king in equity and conscience ought to do. This is done in cases of charities for purposes so undefined, as not to come within the statute, or general charities, with which the commissioners have nothing to do, but must be determined by the king in chancery, on an information by the attorney general.

In a leading case on this subject, the decree of the commissioners was reversed as to a general charity, but affirmed where the objects were defined with reasonable certainty, (2 Lev. 167,) so as to come within the statute. In these three classes of cases not embraced in the statute, therefore, viz.—1, where the objects are wholly vague; 2, cases excepted; 3, cases within the jurisdiction of the ordinary, as also cases provided for by the 17 Edw. II., or 1 Edw. VI., the jurisdiction of chancery is wholly independent of its provisions, and is exercised as if it had never passed; as is strikingly exemplified in the cases of hospitals placed under the power of the commissioners by the 39th, but excluded by the 43 Eliz.; there was no ground on which chancery could take their supervision as to the execution of trusts, but by its extraordinary or personal jurisdiction existing before the 43 Eliz. It has been supposed that the latter must have been derived from the statutes, from the circumstance of there being no reported cases of its exercise antecedently: if there is any weight in this supposition, it applies with the same force for sixty years afterwards, for there is no reported proceeding in chancery on charities where the king is a party till after the restoration of Charles II.; but this circumstance is satisfactorily accounted for, by referring to former statutes.

All the lands of the abbeys, monasteries, &c., which were suppressed by the statutes of Hen. VIII. and Edw. VI. were placed in the hands of the commissioners appointed by the king, under the order and governance of the

court of augmentation of the king's revenue, which had also the exclusive cognizance of all claims for charities, charged on, or accruing from the suppressed lands, by which the king could be in any way prejudiced or affected. Keb. St. 608; 4 Co. Inst. 121; Gilb. Ex. 159; 2 Ruff. St. 226. On the abolition of this court, its powers devolved on the exchequer, without any act of parliament, (Dyer, 216 a. pl. 55; Skin. 612; 1 Bac. Abr. 597,) which had the control of the king's lands and revenues, (4 Co. Inst. 194,) before the erection of the court of augmentation, in 27 Hen. VIII., ch. 27; 4 Co. Inst. 121–2.

The king's demesne and purchased lands, with those which accrued by forfeiture and escheat, together with all matters affecting them, were under the supervision of the exchequer, which was a court of original jurisdiction, both in law and equity, by ancient statutes and usage, in all cases affecting these lands, or any claims upon them, or his revenues or profits issuing therefrom, in which the proceedings were by bill, information, *monstrans de droit*, petition of right, or the traverse of inquisitions, as the case may be. 3 Bl. Com. 44; 2 Co. Inst. 23, 553; 4 Co. Inst. 108; 1 Bac. Abr. 597; Hob. 63; Hard. 50; 2 Lev. 34; Dyer, 303; 3 Day's Com. Dig. 312.

The court of wards and liveries was erected by the 32 Hen. VIII., ch. 46; it was a court of record and equity, in which the proceeding on the part of the king was by information in the name of the attorney general, and on the part of a subject, by the usual mode of proceeding appropriate to the jurisdiction of the court, which extended to all wardships of the king by statute, tenure or prerogative, in any lands or their issues and profits, as well as the estates of idiots and natural fools, and charities charged on the lands of his wards or tenants, which were in his wardship. 4 Co. Inst. 188, 202; Bohun Ch. C. 468; Hob. 136. The jurisdiction of the exchequer was taken away from all cases cognizable by the court of wards and liveries, (4 Co. Inst. 189,) and the statute 33 Hen. VIII., ch. 39, declared the jurisdiction of all these courts to be exclusive over the subject matter within their respective cognizance. Keb. St. 555; 2 Ruff. St. 324. The courts of augmentation, and surveyors of the king's revenues—of exchequer, and wards and liveries, had all the powers of a court of equity, in the exercise of which they proceeded by information, petition, traverse of inquisition, or English bill, and decreed for or against the king, according to the equity and conscience of the case as between subject and subject. 7 Co. Rep. 19 b.; Hardr. 27, 176, 230, 502; 4 Co. Inst. 19; Hob. 136.

A reference to matters placed under the supervision of these courts, will show conclusively, that during their existence the chancellor could in no capacity act upon charities in any case to which the king was a party in interest, or where he came into court by the attorney general; if a charity was charged upon his lands, or those he held in ward, its order and governance belonged to some of these courts exclusively, and, as *parens patriæ*, all lands so given to charities as to require his interposition by sign manual, came directly within his wardship—as in the case of infants, idiots and lunatics. 2 P. Wms. 103–118. Hence all jurisdiction over charities which were too vague and general to vest according to the ordinary rules of equity—all charities charged upon lands which would have escheated to the king or mesne lords but for the provisions of the statute of templars—all charities

charged on the suppressed lands for superstitious uses, which would have been seized by the king under the statutes of chauntries, but for the direction of the statute 1 Edw. VI.—and all charities charged on lands belonging to the king's wards, was devolved on the court of wards and liveries.

The powers of this court were derived from the 32 & 33 Hen. VIII., and not from the 43 Eliz., which makes no mention of it. Yet we find from Griffith Flood's Case, (Hob. 136,) the authority of which is admitted, that that court decreed the establishment of a charity out of lands in wardship of the king, Flood being his tenant; the decree was made by the ordinary power of the court, and in a case not only not within the 43 Eliz., but expressly exempted by it, as one of the colleges of Oxford; the only effect of this statute was to remove the disability on corporations imposed by the statute of wills.

While the power of this court continued, that of chancery over the subject was necessarily suspended, as the king could not proceed in it by his sign manual appointing charities, or the chancellor as his substitute; but as these charities were originally cognizable by the chancellor, and his jurisdiction ceased by being transferred to another court, and not for any want of a competent power to effectuate all its objects, it would revert to it on its abolition, as was the case of the exchequer on the abolition of the court of augmentations. The court of wards was abolished with tenures in chivalry, first by Cromwell's parliament and afterwards by the 12 Car. II., (Keb. St. 1147; 3 Ruff. 192,) but the statute contained no provision for devolving its powers on other courts. That portion of its jurisdiction which grew out of feudal tenures was of course extinct, that which was founded on the prerogative of the king in the supervision of charities, the care of lunatics, infants and idiots having been before the erection of the court of wards within the cognizance of the chancellor, returned to him as an original jurisdiction which had been merely suspended. Fonb. 207; 2 Vern. 342; 3 Bl. Com. 427-8; 2 Atk. 553; 3 Atk. 635; Mitf. Pl. 29.

When the chancellor resumed this branch of his jurisdiction the proceedings were conducted as they had originally been, and as followed by the court of wards, according to the usual course of equity in all courts, by modes of proceeding appropriate to the case, and according to the principles which had been settled by long and uniform usage in the exercise of its powers; by an authority neither conferred nor enlarged by the 43 Eliz., nor assumed from the necessity of the case on the subject of charities, more than any others to which their unquestioned jurisdiction extended.

The personal or prerogative jurisdiction of the chancellor has been and continues to be the subject of great diversity of opinion in England and this country; but the radical difference between the two governments precludes the necessity of examining the question in this case.

Here the executive of the state, or union, has no prerogative powers or authority; his sign manual can confer none on a court of chancery; the chancellor is not the keeper of his conscience, or the attorney general his representative in courts of law or equity; the rights and prerogative of the crown devolved on the several states by their declaration of independence, and the assumption of the powers of self-government. The general supervision of

infants, idiots, lunatics and charities, which thus devolved on them, can be exercised only by the authority of the legislature. A state cannot be made a party to a suit, without its consent expressed by a law or resolution, and no judicial proceeding or process by or against the attorney general, unless by the authority of the state, can prejudice its rights. He can have no control over the fund which may belong to the state by escheat, on the extinction of all the objects for which it was created, and a failure of the heirs of the donor, or which comes to the prerogative wardship of the state over persons under legal disabilities; neither can be disposed of without an act of the legislature, who are the keepers of their own conscience, as fully in relation to their prerogative rights over the property of others, as the original public domain of the state.

It suffices for the purposes of this case, to have ascertained that the original inherent powers of chancery proceeding as a court of equity, according to equity and good conscience, can be exercised by this court to the full extent of the emergency of this case, independently of the 43 Eliz., either by its enactments, or any new rules or principles of the law of equity supposed to have been developed in its exposition. Having given our views of the equity jurisdiction of the federal courts, in the case of *Baker* v. *Biddle*, we deem it unnecessary to review them, as we are fully satisfied of the correctness of the opinion there delivered. Its application to this case will be found to cover all the questions of jurisdiction which can arise.

Having disposed of the objections to the capacity of the meetings of Friends in this and other states, to take by deed or will for charitable purposes; the next subject of inquiry is as to the particular uses specified in the will—in the contested items which are,—No. 9. The eight acre lot is devised to the yearly meeting as a fund, the income of which is to be paid as an annual subscription into their stock—the application of which has been to the printing and dissemination of books and writings that have been approved of by the society. 10. The bequest of the one thousand dollars to the five monthly meetings of women friends, is for the relief of the poor members thereof. These meetings have a common stock and treasurer, and it is applied to the support of the poor, and teaching poor girls trades. 11. This is a bequest of £30, and interest from the year 1759, for the use of certain Indians. This sum appears to have been received by the father of the testatrix, from one Captain Newcastle, an Indian, for the use of his cousins, but a small part of it only was paid—the will directs this sum to be put into faithful hands, and was devised to the treasurer of the yearly meeting, for the relief and benefit of said Indians, for whose use it had been received by her father, and was evidently intended as the payment of a debt which she assumed by her will. 12. This was a legacy to the treasurer of the yearly meeting in Philadelphia, appointed to relieve the Indians, to the benefit of said Indians. The objects of the meeting are the civilization and improvement of the Indians of the Seneca and Tuscarora tribes in New York, to supply them with articles of husbandry, oxen, and iron for mills. 17. Is a like bequest to the treasurer of the Baltimore yearly meeting, for the relief, benefit, and civilization of the Indians under their care, who live in the state of Ohio. No money appears to have been expended for this object for some years past, but the committee

are ready to carry them into effect, if they can be found. 18. This is to Friends composing the Baltimore yearly meeting, towards their "stock," if they have one, if not, to one when it is their pleasure to establish it. It appears that this meeting had a stock at the death of testatrix, which was applied to the printing of books of a religious character, or on business of the society, the expenses of members attending the legislature, and the keeping of Friends' horses during the meeting. 19. This is a legacy to the yearly meeting at Mount Pleasant, in Ohio, for their stock, as in the preceding clause; there is no doubt they have a stock for the same purposes as other yearly meetings. 20 & 21. Are legacies to Quaker meetings in Virginia for the relief of the poor thereof—towards the enlarging their meeting house, and the erection of a stone wall to enclose the lot on which it is built—both meetings have a stock and treasurer, and all yearly meetings have a stock. 22. Is a legacy to the citizens of Winchester, in Virginia, (which is an incorporated town,) for a fire engine and hose.

It would be a waste of time to examine into the validity of these uses; as objects of charity, benevolence or liberality, by the common or statute laws of England or Pennsylvania, they are good and valid by both; (4 Wheat. 45; 17 S. & R. 93,) even the statute 9 George II., does not apply to bequests of money or personalty, and the testator has specified purposes, charitable in their nature. 2 Rop. Leg. 105–6; 9 Ves. 406.

There appears no adjudication as to a bequest for a fire engine or hose, but there needs no argument to prove it as much an object of public utility, as a session house, (Poph. 139,) a town house; (7 Johns. Ch. 294,) or of charity, as cleansing streets, (23 Hen. VIII. ch. 10,) the repairing bridges, &c. (1 Edw. VI., 43 Eliz.,) or in case of taxes and assessments for the preservation of the property of the citizens. We should administer the law of charity in this state, with little regard to its principles, in excluding from its protection so laudable an object as this.

As to the bequests for the benefit of the Indians, there can be no doubt of their being proper objects of charitable donations, as coming within what Swinburne defines, "poor miserable persons," calling for the aid of the charitable and benevolent. Swinb. 66.

They have been so recognised by the legislature of the state in the laws of 1788, incorporating a society for their relief and improvement, as a pious and charitable purpose, (Laws of 1788, p. 40,) in this particular, both judges fully concur; though there is a difference of opinion on some matters connected with this bequest, which were much dwelt on in the argument on both sides, there is none as to their being proper objects of charity, and that the uses and purposes to which the donations of the Quaker meetings are applied, are not only lawful, but in the highest degree deserving encouragement and protection. We have thus come to the conclusion, that the devise of the eight acre lot, and all the bequests in the will of Sarah Zane, which have been contested, are for pious and charitable uses and purposes, sanctioned by law.

The next inquiry is, are they so limited or appointed as to take effect for the objects intended. It must be observed, that except the 22d, the devises are all in trust for the objects of the charities; the only interest which any

of the Quaker societies have in the bequests, is in aid of their contributions for their stock, which appears to be made up by assessments on the different subordinate meetings, but they take in no other way for any individual or collective use or benefit. The organization of these meetings is very regular, though none of them are incorporated. Their gradation is,—preparative, monthly, quarterly and yearly meetings—the latter having the control of all the subordinate ones, but all composed of the same members, and each meeting has its stock and treasurer, its application being directed, by the respective meeting, to agreed, approved and definite objects.

The testatrix was a member of the Philadelphia yearly meeting, and appears to have been connected, in a friendly manner with the meetings in Baltimore, Frederick county, in Virginia, where she died; and with the meeting of Mount Pleasant, a branch from the meeting of Maryland. We must therefore presume her to be familiar with the organization and discipline of all the meetings, in all their details, as is evident from the provisions of the will. When she devotes part of her property to the stock of a particular meeting, it is most certainly her intention that it shall be applied according to its discipline and usage, as well known and understood by herself. It follows that a contribution to such stock is of the same legal effect as if the objects of its application had been specified in the will, as in the case of a devise to an hospital, or any known institution; it is for the uses and purposes intended by the founder; so a devise by way of contribution to a fund devoted to specific objects, by a society who make it up, is in law a devise to such purposes and such only, it can be directed to no other by the trustees, or a court, though the object may not be clearly defined. 1 Vern. 43, 55; 1 Eq. Cas. Abr. 99; 1 Atk. 356; 3 Merivale, 400.

It will be ascertained by usage, by the situation and circumstances of the testator, to discover what he meant, when the will gave no explanation; (3 Eq. Cas. Abr. 366, &c.; 3 P. Wms. 145,) as if he was a refugee, and devises generally to the poor, it shall be intended poor refugees of the same nation as himself, (Amb. 422; Duke on Charitable Uses, by Bridg. 494; 2 Rop. Leg. 147; S. P., Swinb. 316, 480;) or "to the charity school," and there were two in the place, evidence was received to show that the testator was fond of the children in one of the schools, and declared he would leave them something at his death. 1 P. Wms. 674–5; S. P., 2 Dall. 70–2; 2 P. Wms. 141.

That a devise to the poor of any particular parish or church is good, has been often decided, (2 Rop. on Leg. 147–8; Toth. 30,) in this case, they are more definite, being to the poor of particular meetings, which, by reference, makes the designation complete, when we advert to the master's report, finding, that, at the death of the testatrix, and before, there were meetings of the kind referred to, at each place designated by her in the will. Finch, 184, 245; 2 Lev. 167–8; 1 P. Wms. 425. The devises for the benefit of the Indians are likewise made specific by the evidence reported by the master, specifying the tribes of Indians, and the particular relief afforded by the committee during thirty years, by the expenditure of large sums of money, from time to time, under the direction of the meeting. The intention to apply the bequests in the same manner, is too apparent for any court to entertain a doubt; if any

could exist, or should hereafter arise, before a final decree, it is within our unquestioned powers to direct further evidence to ascertain and carry it into execution, if no other objections exist than the want of certainty in the will itself.

In 4 Wheat. 1, the devise was to "The Baptist Association that for ordinary meets at Philadelphia, annually," which "I allow to be a perpetual fund for the education of youths of the baptist denomination, who shall appear promising, for the ministry, always giving a preference to the descendants of my father's family." The court declared the association to be described with sufficient accuracy, (p. 26,) and that such a legacy would be sustained in England, (p. 29;) so that there was no doubt of the validity of the devise, had the trustees been capable of taking for the objects intended. In *Witman* v. *Lex*, the devise was "To St. Michael and Zion churches, to be laid out in bread for the poor of the Lutheran congregation, of which the testator was a member, and towards the education of young students of that congregation, under the direction of the vestrymen of the first named churches;" and held good. 17 S. & R. 90–93. So of land appropriated by deed for public uses for the benefit of the inhabitants of a town, as a majority may order and direct. 6 S. & R. 211. So of a lot marked in the plan of a town, "for the Lutheran church," for religious purposes. 2 Pet. 578. This was held good without further description of either the donees or uses, and to take effect when the church should be erected. The court took into consideration the use to which the lot had been appropriated from the time of the donation, which was for a meeting house and burying ground, and though the house had fallen down from decay, and no new one had been erected, they decreed it to be enjoyed according to the former use.

A legacy to the town of New Rochelle, to erect a town-house to transact public business in, has been held a sufficient description of the charity. 7 Johns. Ch. 294; S. P., 1 Ch. Cas. 134. Courts of chancery act under an obligation to effectuate charitable donations by all the means in their power; (2 Freem. 261, 330; 3 Mer. Rep. 391,) more liberally than in private cases, without regarding the form or prayer of the bill. 1 Atk. 356; 1 Bro. Ch. Cas. 12; 2 Ves. Sen. 426; 1 Ves. Sen. 418; 2 Eq. Cas. Abr. 198; 11 Ves. 365; 1 Ves. Sen. 468–75. It is enough that the testator expresses his general intention to establish a charity by making a donation to any object deemed charitable in law, or by using the word charity; (2 Ves. 399; 10 Ves. 535; 17 S. & R. 93; 4 Wheat. 45,) wherever a trust is created for charitable purposes, the mode by which it is to be effected, or the specific objects of its application are not material to its validity. 2 Rop. on Leg. 140, and cases cited; 3 Pet. 119; 1 Atk. 469; 3 Bro. Ch. Cas. 528; 7 Ves. 69, 86. They are put on the footing of dedications of property to public benefit, requiring no particular grantee or trustee capable of taking; though the object is not *in esse* at the time of the devise, (9 Cranch, 331–2; 2 Pet. 582–3; 6 Pet. 437,) the land remains charged with the charity in the hands of the heir till the object comes into existence; (2 Vent. 349; 3 Pet. 114–19; Bridg. Duke, 534;) so of money in the hands of a trustee, the profits accumulate for the benefit of the fund. 3 Atk. 238.

Chancery will establish the charity on the application of any person who has any interest in the fund in his own right, or as an inhabitant, or a parish

officer; (1 Ch. Cas. 134,) a member of a society having a common benefit from the donation, or a committee of a voluntary association without charter, though they could sustain no action at law; (2 Pet. 584–5,) "according to what may be collected to be the true meaning and intent of the donor, notwithstanding any failure or defect in the bequests, gifts or grants," as is correctly expressed in the rejected law of 1712. The courts of this country have gone *pari passu* with those of England, in aiding defective descriptions or designations of the places, objects or purposes of a charity, wherever they could, by the terms of the instrument, connected with extrinsic circumstances, give locality and application to the fund according to the intent of the donor as near as may be. 3 Pet. 117. Words will be construed in their most liberal and expanded meaning, in order to make out the substance of a charity capable of being aided on equitable principles, or the existence of a trust in the heir at law, devisee or executor, in the execution of which any individual or society has an interest which can be enjoyed by them, or held for their use, consistently with the terms of the donation by an equitable right; chancery will draw to it the legal interest, and give it full effect by a plan to be drawn up under the direction of the court by a master, or the trustee.*

An inscription on a tombstone has been held sufficient,(Bridg. Duke, 349–66,) or any direction by any writing, which can be deemed to be a limitation, disposition, assignment or an appointment, or gift of property to a charitable use—it will be enforced against parties and privies, except purchasers for valuable consideration of money or land, without notice of the trust—not regarding the form of the instrument. Moore, 888; Comyns, 250; Prec. Ch. 471; Sugd. Pow. 222–3. A direction by a nuncupative will, was held to be an appointment or limitation before the statute of wills. Dyer, 72, pl. 2; Swinb. 56, 68; Toth. 31.

Chancery acts whenever there is a trust, (3 Atk. 108; 2 P. Wms. 326,) which never fails for want of a trustee, (1 Penn. Rep. 51–2,) though he dies before the testatator, (2 Eq. Cas. Abr. 293; 1 Bro. Ch. Cas. 15; Amb. 571; 3 Bro. Ch. Cas. 528,) refuses to act or abuses his trust, (2 Ch. Cas. 131; 7 Day's Com. Dig. 772,) chancery will remove him and appoint another, (Ch. Rep. 78–9; 2 Eq. Cas. Abr. 194,) or compel him to assign it. Finch, 269. These are the principles of equity which the supreme court, in 17 S. & R. 91–2, declare to be the common law of the state, which have been uniformly applied as far as the powers of the courts could be extended to the exercise of chancery jurisdiction; since the acts of 1818, 1825 and 1828, they can be applied to all trusts as fully as they can be in England, by the common law of equity, or the provisions or construction of any statute. They cover all the ground of equity which it is necessary to assume for the decision of this case; the

* Though the objects of a charity are uncertain, a devise will not fail for want of a trustee capable of taking, if a discretionary power of selecting is vested any where. And such power may be vested in an unincorporated religious association. Thus, a devise of real and personal estate to the monthly meeting of Friends, at Philadelphia, for the northern district, (being an unincorporated religious association) to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institution or free school, in or near Philadelphia, was established in a court of equity, against the heirs and representatives of the testator, on a bill by certain members of the meeting, on behalf of themselves and other members. *Pickering* v. *Shotwell*, 10 Barr, 23; and see *Beaver* v. *Filson*, 8 Barr, 327; *Wright* v. *Linn*, 9 Barr, 433.

defendant is a trustee for the purposes of the will; the bequests are to trustees either named or designated, who are capable of holding and distributing the funds intrusted to their management, the *cestuis que trust* are either sufficiently described or easily ascertained by extrinsic circumstances, and the uses for which the dispositions are made are not only valid, but favoured and protected by the law, which we can effectuate without the exercise of any personal or prerogative jurisdiction.

We shall direct the administrator *de bonis non, cum testamento annexo*, to pay the respective bequests to the persons appointed to receive and distribute them. They will be considered as trustees, acting under the supervision of this court, as a court of chancery, with the same powers over trusts, as courts of equity in England, and the courts of this state, possess and exercise. Though our original cognizance of the case depends on the residence of the parties to the suit, yet when the fund is under our control, we can proceed in its final distribution among the different claimants in the same manner as if each was a party competent to become an original complainant, by original bill. *Baker* v. *Biddle*, MSS.

When the fund shall be so ascertained, as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue till a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes, or *cestuis que trust*, than those which can, by equitable construction, be brought within the intention of the will or donor, is an exercise of that branch of the jurisdiction of the chancellor of England, which has been conferred on this court by no law, and cannot be exercised, *virtute officii*, under our forms of government.

As the amount of the personal estate is evidently far short of the legacies made payable by the will, there must be a failure or abatement, unless the necessary amount can be raised out of the real estate not specifically devised. The testator having authorized the executor to sell the house in Chestnut street, and the Marlborough estate in Virginia, his powers devolve on the administrator *d. b. n. c. t. a.*, by the acts of assembly of this state; (3 Sm. Laws, 433–4; 6 ibid. 102,) and as he is a party before us, we can compel their execution, if the laws of Virginia recognise them as competent. But he has no power over any other portions of the real estate, nor are the heirs at law, or residuary devisees, parties to the suit; so that no decree which we could make would bind them, or the land situated in another state: our jurisdiction being both limited and local, we cannot compel parties who reside out of the state to appear on our process, and a sale of land in Virginia, under the authority of the court alone, would pass no title to the purchaser.

It is an acknowledged principle that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title can pass from one person to another; (7 Cranch, 116; 6 Wheat. 579; 9 Wheat. 571; 10 Wheat. 202,) to which may be added the case of *Bryant* v. *Hunter*, to which we have been referred, as authorizing the sale of the Virginia lands, now asked to be directed. 2 Wheat. 32, &c. That was a suit originating in this court, affect-

ing land in Kentucky; but as only five-sixths of the land were represented by the parties to the suit, the court confined their decree of sale to the interest of the five parties before them; the sixth party in interest resided in Virginia, as to whom the supreme court declared, "That the complainant must pursue his remedy, unless her representatives shall have the prudence voluntarily to join in the sales of any land that may be made under this decree." 4 Wheat. 34, 44, 45. We are therefore following all these decisions of the supreme court, in refusing to make any further order of sale of real estate, other than the two parts thereof embraced in the power given by the will.

The decisions of the supreme court of the state, and of the high court of errors, which bear on the residuary devise in this will, may derange some of the specific devises; if the legacies are a charge on the real estate specifically devised, they might affect not only the devise of the eight acre lot, given to the yearly meeting, but other devises to persons not parties to the suit, who must be heard before we can make any decree, touching such parts of the real estate. The application of the rule laid down in *Tucker* v. *Hassenclever*, 3 Yeates, 294–99; 2 Binn. 525–31; *Nichols* v. *Postlethwaite*, 2 Dall. 131; *Witman* v. *Norton*, 6 Binn. 396; and *Commonwealth* v. *Shelby*, 13 S. & R. 348, would absorb much of the real estate to pay the legacies; but if they should be considered as a charge only on the residuary fund, according to *Shaw* v. *M'Cameron*, 11 S. & R. 252, they will not affect the devised lands. On this point we have formed no opinion.

It remains only to apply the foregoing view of the law of Pennsylvania to the dispositions of the will in question.

1. To the devise of the eight acre lot to the yearly meeting. We know historically that this has been a religious society from the settlement of the province. We know, from the acts of the legislature, that they have held real estate, and yet hold it, under deeds from the proprietor, from individuals, and by the laws of the state, guarantied by all its constitutions, have a perfect right and capacity to take, hold and enjoy property without incorporation, or tenure in mortmain.

2. The bequest to the monthly meetings of women friends, is for a charitable use, which is good and lawful, and they are capable of taking and distributing the charity, according to the will of the donor, in the most liberal and ample sort.

3. The bequest of the thirty pounds received by the father of the testatrix from Captain Newcastle, and the interest, we consider to be intended as the payment of a debt which she considered herself to be morally and equitably bound to pay, and therefore direct it to be paid by the executor, as a debt of the estate, to such Indians as are the relations of the said Newcastle, if to be found; if not to be found, to remain subject to the future order of the court.

4. As to the devises to the Indians, our opinion is, that they are good and valid. That the treasurer of the societies or meetings, or their committees for the time being, are capable of taking and distributing the fund as a trustee under their direction, and that Indians are proper objects of charitable bequests. But they are to be applied to the relief of such Indians as have heretofore been under the care and supervision of the yearly meetings, or

their committees respectively, and to be distributed only for such objects and purposes as were customary in the lifetime of the testatrix, such being her manifest intention.

5. As to all the devises to or for the benefit of the different meetings of Friends in Baltimore, Virginia and Ohio, we are clearly of opinion that they are good and valid in law, and decree accordingly.

6. As to the bequest to the citizens of Winchester, to purchase a fire-engine, we consider it good as a charitable use, or one tending to public profit and the safety of property, and in ease of taxes and burdens on the citizens; this is the substance and intent of the bequest, and being given for a good and meritorious object, it is not material by what name it is given, whether to the corporation, or the citizens who compose it, it must take effect, notwithstanding any misnomer or other defects of name, form or circumstance.*

7. The bond of Isaac Zane appearing to us to have been assumed by the testatrix as honestly due by one of her near relations, ought to be considered in equity as a debt due, and be paid by the executor out of her estate, as such was evidently her intention, and from the evidence reported by the master, we think the party now before the court entitled to receive it, and decree accordingly.

8. We order and decree that the administrator *de bonis non* make sale of the house and lot in Chestnut street, at such time and place as the court may hereafter direct, or private sale, at his discretion.

9. Also to make sale of the Marlborough estate in Virginia, in the same manner, if such sale is authorized by the law of Virginia. If such sale is not authorized, then we order and direct the administrator to make application for such authority to the legislature or such judicial tribunal as by the law of that state is competent to authorize such sale, according to the will of the testatrix, or the order of this court.

We have been asked to go farther, and decree a sale of all the undevised estate of the testatrix, as necessary to provide a fund to meet the various legacies and bequests;—the counsel who made the application considering that the residuary clause in the will was to be so construed, that nothing should pass under it till all the former dispositions were satisfied. As the residuary devisees are not before the court, and would not be bound by its decree, we have not considered, and shall express no opinion on that subject —having no power to affect real property in another state, but through the parties in interest, or those having power over it, we must confine our order for the sale of the estate to such parts of it as are in the hands, or within the control of the administrator under the authority of the will. We have full power to see that the will be faithfully and religiously observed and executed, but none to order a sale not directed to be made by any of its provisions.

* A voluntary association of individuals, who have contributed funds for a public purpose, will be regarded as a charity, and a court of equity in this state has jurisdiction over the parties. Funds supplied by the gift of the crown, or from the legislature, or from private gift, for legal, general or public purposes, are charitable funds, to be administered by a court of equity. Therefore, where money is given by will, gift, or voluntary contribution of individuals, to a voluntary, unincorporated hose company, or fire association, formed for general and public usefulness, without individual emolument or advantage, it is a charity over which a court of equity will exercise control. *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98.

Vernor's Executors *v.* Fisher et al.

Devise of two-thirds of a plantation to the two daughters of the testator's deceased brother. There were three daughters. *Held*, that the devise was not void, but was to be construed as being to all the daughters; the circumstances explaining the ambiguity making it evident that such was the intention of the testator.

ERROR to the District Court of Lancaster.

The opinion of the district court contains a sufficient statement of the facts of this case for a proper understanding of the point decided.

HAYES, President.—The question in this case is, whether the devise in the first item of the last will and testament of Benjamin Vernor, deceased, unto the two daughters of his deceased brother, John Vernor, and unto John T. Vernor, the grandson of his said brother, John Vernor, deceased, of his plantation or tract of land whereon he the testator then lived, &c., is a void devise, so far as regards the daughters of John Vernor, or not. This is a case of latent ambiguity. It is proved that John Vernor's daughters were three in number, namely, Martha, wife of William Hilton; Margaret, widow of Charles D. Cooper; and Mary, widow of John Cuyler. What, then, was the intention of the testator in devising to the two daughters of his deceased brother John? Did he intend a benefit to all the daughters of his brother, or did he intend to give the two-thirds of his plantation in this way, if it could be so given, or otherwise not to give it at all? The original notes of the testator's instruction to the scrivener are made a part of the case, and materially elucidate the obscurity of this devise.

The testator begins the instructions of the 8th of February, 1830, thus: "To John T. Vernor, of Albany, grandson

of my brother, John Vernor, my plantation with the buildings and appurtenances, containing upwards of 200 acres more or less, in Leacock township, Lancaster county, adjoining lands of Thomas Lyons, John M'Casky, Thomas Lyon and others, to hold to him the said John T. Vernor, his heirs and assigns for ever. This land I got by my father, John Vernor's will."

He next bequeaths a legacy of 8000 dollars to James V. Henry, son of his deceased sister Elizabeth, and then bequeaths to Robert Clinch, son of Benjamin Vernor Clinch, and grandson of his sister Hannah, 4000 dollars.

He thus gives, in these first three clauses of his original instructions, the bulk of his estate to certain descendants of his brother John and of his sisters Elizabeth and Hannah; and in giving his plantation, his homestead, to John T. Vernor, the grandson of his brother John Vernor, he subjoins the remark: "This land I got by my father John Vernor's will." The only alteration which he subsequently made in this disposition of his estate among his relatives, was in the first clause;—the devise of his plantation, and his instructions concerning it, the scrivener thus noted, a few days before the will was made: "The plantation given in my will to John T. Vernor, I revoke the devise thereof, and now give the same to the two daughters of my brother, John Vernor, deceased, (aunts of the said John T.) and to the said John T. Vernor, their heirs and assigns for ever; to wit, each to have one undivided third part thereof." This altered devise was drawn out in the will, in the following words: "Item. I give and devise unto the two daughters of my deceased brother, John Vernor, and unto John T. Vernor, the grandson of my brother, John Vernor, deceased, my plantation or tract of land whereon I now live, situate in Leacock township, in the county of Lancaster, adjoining land of Thomas Lyon, John M'Casky, Thompson Jacobs and others, and the old Philadelphia road, containing upwards of 200 acres, should it be more or less, to

have and to hold the same to them, the two daughters of my deceased brother, John Vernor, and to the said John T. Vernor, their heirs and assigns for ever, each to have an equal undivided third part thereof."

It does not appear, that the testator was personally acquainted with these daughters. Mr. Moore states, that he had a perfect and distinct knowledge that his brother John had three daughters living in 1829. He does not, however, say, that Benjamin Vernor ever saw them, or any of them; and it is inferable from his testimony, and I infer, that whatever knowledge the testator had, was derived from conversations with the witness and others, with respect to his family connexions. It would not be singular, that a man of B. Vernor's age (about 87 or 88 years) should have known from the report of others in 1829, that his brother had three daughters then living, and yet in 1830 should have forgotten that there were more than two. The probability of his having forgotten it, is the more reasonable, from the great number of his relatives, the distance at which they resided from him, and his own unsocial life and temper. That he did forget the circumstance of the precise number of his brother's daughters, is evident from the phraseology used in describing them; for he does not describe them by their names, which, had he known or remembered them, he probably would have repeated; and having forgotten their names, it is the less strange he should forget their number. He does not devise to *two of the daughters* of his brother, or *two daughters* of his brother, as if he had known there were more than two, and simply wished to bestow his bounty on two only, and not on all; but he employs the very phraseology he would have chosen, had he supposed there were but two daughters of his brother living, and intended to make them devisees. "I give and devise unto *the* two daughters of my deceased brother, John Vernor, &c., to have and to hold to them, *the* two daughters," &c. No fact is stated, that was calculated, or

that tended to induce him to select any two of three; nor is there a word, indicating the purpose to make a discrimination. Had he so designed, there are many descriptive phrases which would have answered the end, without even naming his nieces: such as, "the youngest two,"—"the eldest two,"—or, "the oldest and youngest,"—or, "the married and elder widowed daughter,"—or, "the younger widowed daughter," &c. It is impossible to believe, that he could have intended to exclude any one of these daughters of his deceased brother from his bounty, because the expressions of the devise do not point to any one, to be excluded, nor designate the two who are to be preferred. But he devises, in general terms, "unto the two daughters of my deceased brother, John Vernor," &c. I take it, therefore, that no one can doubt the testator was ignorant, at the time he dictated this devise, that there were *three* daughters of his deceased brother, John Vernor, then living, and that he actually believed there were but *two*. What, then, was the object of the devise in question? Was it to give a part of his land to all the daughters of his brother? Or was it to give to some *two* of them; and if the devise would not be valid in that way, (according to the argument in behalf of the plaintiffs,) not to give it at all? This question appears to be already answered. If the testator believed that there were but *two* daughters of his brother John, his intention was, by this devise, to give a part of his plantation to *all*.

There are other considerations arising out of the case which make such an intention more manifest. The grandson of his brother John was, in the original instructions given to the scrivener, the first and chief object of his remembrance. Upon him he bestows his plantation; and to the directions which he dictated in regard to this important devise, he adds the significant explanation, that this land he got by his father, *John Vernor's will*. The associated, influential sentiment, is obvious: *It is reasonable*,

therefore, that I should leave it to his son John, if he were now living; and, being dead, that it should go to his descendants. I therefore leave it to his grandson bearing the same name. There was an interval of four months before the will was drawn, and the subject of the devise appears to have occupied his attention in the mean time. Other reflections arose. If it were reasonable, that he should leave this plantation to his brother John, were he living, was it reasonable that he should pass by his brother John's daughters, his immediate living descendants, and give it all to a grandson? He came to the conclusion that it was not; and the result was, that these daughters became collectively, instead of John T. Vernor, the principal objects of his bounty—for he devises to them first, and gives them two-thirds of his plantation. Another consideration makes it plain, that the change in the disposition of his homestead, was not occasioned by any diminution of regard for or confidence in John T. Vernor; for, in the second instructions given to the scrivener, in which the devise is thus altered, he makes John T. Vernor one of the executors of his will, in the place of James Buyers, who was originally nominated. In distributing his estate among his relations, the testator's memory seems to have clung to his brothers and sisters. Thus in the three items, in which he gives the great bulk of his property to them, he in each instance designates the objects of his bounty, by their relationship to his brother John and his sisters Elizabeth and Hannah. It is true, that in all the other instances, he likewise *names* the particular objects; which is a persuasive circumstance to show, that he omitted the names of his brother John's daughters, only because he was unacquainted with them. With respect to the devise in question, the important consideration with the testator, apparently, was to give to the daughters of his brother, not on account of their personal qualities, names, particular situation, supposed number, fortune or condition, but as the daughters of his deceased

brother John. This was the prominent idea, and it is inconsistent with the supposition of an intent to bestow his bounty upon two of those daughters, in exclusion of a third. Add to these considerations, the utter improbability that such a man as Benjamin Vernor, had he known that there were three daughters of his brother John then living, would, in disposing of what he must have considered the most precious part of his estate—his mansion farm—and which was in fact the most valuable portion, give it to two of those daughters, without designating which, in terms so uncertain as to render the whole devise a mockery, and it must be perfectly clear to every mind, that he intended to devise the two-thirds of his plantation to all the daughters of his brother John, though, at the same time, he believed there were but two.

The distinction taken in some of the English cases between a bequest of personal property and a devise of real estate, with reference to the means of ascertaining the testator's intention, has nothing to sustain it, except the relics of that inordinate regard for the latter species of property, which arose out of the feudal tenures, and which once deemed all jurisprudence as subservient to its uses. The reasonableness of the distinction has been questioned in England, on principle; and as the object, in each case, is the ascertainment of the real situation and intention of the testator, it is admitted to be difficult to conceive, that there should be any diversity as to the means. Stark. Evid. part 4, p. 1699. In other English cases of devise, I do not find that this distinction has been noticed, but the construction has been freely aided by extraneous parol evidence. In *Goodtitle* v. *Southern*, the devise was, of "all that my farm, lands and hereditaments called Trogue's farm, situate within the parish of Darley, in the county of Derby, now in the occupation of A. Clay, unto my brother John Southern and to his heirs and assigns for ever." Lessor of the plaintiff claimed under the residuary clause

in the will, which it was admitted would entitle him to the premises in question, provided they did not pass to the defendant under the above devise. It was proved that Trogue's farm was in the occupation of A. Clay; but the closes in question were not in his occupation, but in the occupation of M. Marsden; and in order to show that they were not parcel of Trogue's farm, and that the testator Richard Southern, did not take them as such, the will of one Houghton was produced, which contained the following devise to Richard Southern: "Also all that piece or parcel of ground, situate in the liberty of Wansley, in the parish of Darley, commonly called or known by the name of Trogue's, otherwise Trough's pasture, called by the name of Dale closes." Richard Southern, when he became entitled to the land under Houghton's will, let two closes to Marsden, and evidence was offered of payment of rent by Marsden to Southern, in order to show that the latter knew in whose occupation the land was. On the part of the defendant, a notice to quit was proved, which had been given to Marsden by Richard Southern, a few months before the time of making his will; which notice was in these terms: "I do hereby give you notice to quit and deliver up the possession of all my lands belonging to and called Trogue's farm, situate in the parish of Darley, now in your possession, on or before Lady-day next." This evidence was objected to by the counsel for the plaintiff, but was received on the trial. The point as to its admissibility, was afterwards argued in the court of king's bench, where it was decided that the evidence was admissible. This, it will be observed, was a case of real estate; and the question was, whether the devise of two certain closes should go to the testator's brother, or to the residuary devisee. It was, consequently, a question affecting the quantity of estate devised to John Southern; in short, whether he should take Trogue's farm with these two closes or without them. So far from confining the parties to the

terms of Richard Southern's will, in order to ascertain the testator's meaning, the court permitted them to go into another will, to see how, and with what parcels, Trogue's farm was devised to Richard Southern. They were also permitted to prove, that he let those closes to Marsden, and that Marsden paid him rent. The only evidence which seems to have encountered objection, was that of the notice given by him to Marsden, to quit, a few months before the will was made; and that, too, was ruled in the king's bench to have been properly received. 1 Maule & Selw. 299; Ram on Wills, 39. I have quoted this case somewhat at large, because it wholly passed over the distinction referred to concerning real estate, without the least regard, and because it meets an objection of the plaintiffs' here, in which is said to consist the stress of their case, namely, that parol evidence cannot be received, to change the quantity of the estate or to alter it. In the case cited, such evidence was received, and for the very purpose of changing the quantity of the estate specifically devised, that is to say, of making the estate of John Southern greater or smaller, according to the construction to be founded thereon. And the case may be the more appropriately referred to here, since the interest of the specific devisee was controverted in it by the residuary devisee, just as, in the case before us, the residuary legatees contest the right of the daughters of John Vernor under the first specific devise in the will of Benjamin Vernor. That appears, indeed, to have been a case which would furnish much stronger ground than the present, for the objection to parol or extrinsic evidence introduced with a view of affecting the quantity of the estate devised, because there the doubt vibrated (if I may so speak,) directly between the specific and residuary legatee; it being admitted, that if the two closes did not pass to the former by the devise to him, the latter was entitled. Here, the question is more complicated; and the result would be different, should the

plaintiffs succeed. In that event, the whole devise to the daughters of John Vernor must be declared void; and then the property, as the plaintiffs contend, does not pass to the residuary legatees, but to the executors, that they may sell the same, and convert the land into money, under the general residuary clause. Now, if there is any one thing more abhorrent than all others, in the interpretation of last wills and testaments, it is the necessity of pronouncing a devise void: "for a devise is never construed absolutely void for uncertainty, but from necessity." To prevent this, every effort is to be made to extract the purpose and design of the testator from all and every part of his will; and "if there be a possibility, to reduce it to a certainty, the devise is good; for the testator must be taken to mean something," says Lord Chancellor Cowper, "if it can, nor must the words of the will be void, if they *can have effect* by reasonable construction." 1 Atk. 411; 4 Bac. Abr. 334.

It is to give effect to the language of the testator, that extrinsic evidence is resorted to in any case. In Lord Cheyney's Case, 5 Rep. 686, in *Beaumont* v. *Fell*, 2 Peere Williams, 140, in *Goodtitle* v. *Southern*, 1 Maule & Selw. 299, unless the evidence had been admitted, the wills could not have taken effect. But where the will can have an effective operation without the evidence of extrinsic circumstances, such evidence has always been excluded. 1 Greenl. Ev. § 291. This is the intelligible line of distinction, which has been drawn in the modern English cases, (see *Doe, Lessee of Sir A. Chichester*, v. *Oxenden*, 3 Taunt. 147,) and which is founded on the solicitude ever felt to give effect to the testator's intentions, that every part of his will may, if possible, stand. But it is not to be forgotten, that the question as to the admissibility of testimony to explain this will, does not directly arise in the present cause; for all the facts are agreed on between the parties in the case stated, and the true and only question is in relation to their effect.

The devise in itself is free from ambiguity. But the plaintiffs introduce testimony out of the will to prove, that, at the time the will of Benjamin Vernor was made, there were three daughters of his deceased brother living; and having thus shown a latent ambiguity, they contend that the devise is incurably defective, because the subject is real estate; though they admit that if personal property, no matter to what amount, had been given in the same terms, the defect might, according to the authorities, be remediable. Having already spoken of this distinction, as it appears to have been recognised in some English cases, I will only add that it is not likely to obtain in Pennsylvania, where the freedom of alienation, liability for debts, and equality of distribution of real estate, place it in the same scale of dignity and consequence with personal property. There being no question concerning the admissibility of any of the evidence incorporated in the statement of this case, and the intention of Benjamin Vernor being indubitable to give a portion of his plantation to all the daughters of his brother John, shall it not prevail in the construction of his will? The intention of the testator, said M'KEAN, C. J., in *Ruston's Executors* v. *Ruston*, 2 Dall. 244, shall govern the construction of a will in all cases, except where the rule of law overrules the intention; and this is reducible to four instances: 1. When the devise would make a perpetuity; 2. When it would put the freehold in abeyance; 3. When chattels are limited as inheritances; and 4. Where a fee is limited on a fee.

The present case is within none of these exceptions. It is a mere mistake of the testator, with respect to the number of his brother's daughters. Similar mistakes have often occurred, and have always been corrected in the construction of devises and bequests. In *Campbell* v. *French*, 3 Ves. 321, where a testator by his will gave legacies to A. and B., describing them as grand-children of C., and their residence in America, and by a codicil he revoked these lega-

cies, giving as a reason that the legatees were dead; but *that not being true*, it was held that the will was not revoked, and that they were entitled to the legacies upon proof of identity. So where the residue of three per cent. annuities was given to the two daughters of A., and A. had *three* daughters, they *all*, on the ground of mistake, were decreed to take equal shares. This was the case of *Stebbing* v. *Walkey*, 2 Bro. Ch. 85. The gift was in trust to pay the same unto and *between* the two daughters of T. S. in equal shares and proportions during their lives, and if *either* of them should die, then to pay the whole to the *survivor* during life, and in case both should depart, the whole was to fall into the residue. T. S. had *three* daughters, and it was held that *all* the daughters should take. Mark here, the various phrases indicating an intention to give to *two* only: as, "between the *two* daughters of T. S. in equal shares; and if *either* of them should die, the whole to the *survivor;* and in case *both*," &c. Observe, too, that the consequence of decreeing to all was to divide the fund into *three* parts instead of *two;* in other words, to alter the amount of the legacy to each of the legatees. So in *Tompkins* v. *Tompkins*, cited in 2 Ves. 564, where the testator gave to the *three* children of his sister £50 each; the sister had *four* children, and they were *all* let in. In *Sleech* v. *Thorington*, the bequest was to the *two* servants that should live with the testatrix at the time of her death, £100, S. S. stock, to be equally divided between them. In fact, she had but two at the time of making the will, and afterwards took another who lived with her at the time of her death: adjudged, that the *third* servant was entitled to an equal share with the other two. If A. devise land to the eldest son of J. S., by the name of *William*, when in truth his name was *Andrew*, the devise is good. Equity Ca. Abr. 212. So is a devise to Robert, earl of, &c., though his name was Henry. Co. Litt. 3. And the wife of J. S., earl of P., dean of D., &c., may take by such name, though the Christian name be

mistaken, for there can be no doubt who was meant by such name. Co. Litt. 3; Hawk. Abr. 4. So where a devise was to Margaret, daughter of W. K., and her name was Margery, it was held that she should take thereby, *quia constat de personâ*, by the description. 1 Freeman, 293. Devise of all the testator's lands to one of his cousin Nicholas Amherst's daughters, that shall marry a Norton within fifteen years. Testator dies. N. Amherst had three daughters, one of whom married a Norton within the fifteen years. *Held*, that this is a good devise to her, notwithstanding the uncertainty, and that the law supplies the words—*who shall first marry*. T. Raym. 84, *Bate* v. *Amherst*. If a man had devised land to Alexander Nowal, dean of St. Paul's, and to the chapter there and their successors, and Alexander Nowal had died and a new dean had been made, and afterwards the devisor had died, the land would have vested in the new dean and chapter; and yet it would not have vested *according to the words*, but according to the *intent*, for the chief intent was to convey it to the dean and chapter and their successors for ever; and the single person of Alexander Nowal was not the principal cause, though it might have been one of the causes of the devise. Viner's Abr. tit. Devise, C. pl. 4; Plowd. 334.

I shall conclude this citation of cases, which all go to illustrate the principle so emphatically laid down in *Findlay* v. *Riddle*, 3 Binn. 149, that the intention of the testator has always been deemed the *first*, *great*, *leading fundamental* rule of the construction of wills, with *Ungly* v. *Peate*, 2 Lord Raymond, 1312; a case which was first determined in the C. P., whose judgment was afterwards affirmed on a writ of error in K. B., and which strongly sustains the point that a devise is good if there is a possibility to reduce it to a certainty, and is never construed absolutely void for uncertainty, but from necessity. A house at Ludgate was devised "to S. and his brothers successively for their lives," and the testator, after mentioning another matter, went on

to say: "And as for my house at Ludgate, I do not leave it to S. nor his brothers, afore to be entered on and enjoyed till one month after their marriages." S. had at the time the will was made two brothers, R. and O.; S. was the eldest, R. the second, and O. the third son. R. died in the lifetime of S. and O. The question was, whether this was a good devise, or void for uncertainty? And it was argued against the devise, first, that it was void for uncertainty by reason of the word *successively*, not showing which should take first and which second, in succession; secondly, that the condition in relation to the marriage made it more uncertain, for till marriage none could take; and suppose the second brother had married, and neither of the other two, who must have taken? Certainly none of them: for if he that was married should take first, then that would overthrow the other construction of *successive*, that the oldest (and only brother named) should take first, then the second, and then the third. *Sed, per totam curiam*, the will was good and certain enough; for being in the case of brothers, the common law was a guide to the exposition of the word *successive;* viz. that the eldest should after his marriage enjoy it first for his life, and then the second, and then the third; and the court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise which before was general, and therefore if the second son had married before the eldest, yet he could not have taken by this devise.

Had the devise of Benjamin Vernor to the two daughters of his deceased brother John Vernor, and to John T. Vernor the grandson, been a joint devise, there might have been more room for doubt, as the effect of its being declared void with regard to the daughters, would in that case have been to pass the whole plantation to John T. Vernor, which was the testator's original intent. But as the two-thirds of this estate, if the devise to the daughters of John Vernor be void, will go, according to the plaintiff's coun-

sel, to the executors to be sold, or according to the defendant's counsel, to the heirs at law in general, it is impossible to doubt that such a disposition of the chief portion of his mansion farm would have been most abhorrent to the feelings, as it was alien from the thoughts of Benjamin Vernor.

The review of the whole case convinces me, 1. That Benjamin Vernor intended to devise his plantation to the immediate descendants, *i. e.* the daughters of his deceased brother John Vernor, and to John T. Vernor, grandson of his said brother; 2. That there being three of these daughters, the testator in devising to "two daughters" was merely mistaken as to the number, but that his chief and indeed only intention with respect to this part of the devise having been to give to *the daughters* of his brother, it is the duty of the court so to construe the will as to carry into effect such intention, which can only be done by letting in the third daughter. I accordingly decide that all the daughters of John Vernor are under this devise entitled, and that judgment be rendered for the defendants.

This case involved a question of great difficulty. The argument in the district court was very elaborate; and after the judgment was rendered, the devise was submitted to one of the most able and distinguished jurists in the United States, the late chancellor Kent. He was of opinion that it could not be maintained, but that it must be declared void for uncertainty. The cause was removed by writ of error to the supreme court, where it was fully discussed, and, after holding it under advisement for a year, the judges ordered a second argument, which being heard, they affirmed the judgment of the district court.

Dillon *v.* Myers et al., School Directors.

[MAY 29, 1844.]

Where an officer claims rights by virtue of his office, he must show that he is legally qualified to act; that he is the officer *de jure* as well as *de facto*.

A person who has not received a certificate as required by the act of April 1st, 1834, has no claim to compensation for his services as teacher, although appointed teacher by a school committee of a sub-district.

It is the imperative duty of school directors to examine every applicant wishing to be employed as a teacher, and their inquiries are to be confined to the "moral character" and "learning and ability" of the applicant.

Under the provisions of the acts relating to schools, the school directors are the legal visitors, and, under the powers conferred upon them, may suspend or dismiss a teacher, or correct any abuses in the school; in case of a sub-district, they should notify the committee of such sub-district of the suspension or dismissal of a teacher.

Where a teacher who was appointed by a school committee of a sub-district, had not received the requisite certificate, and who, upon application to the directors, they refused to examine, proceeded to occupy the school-house and teach the scholars, against the will of the "directors;" on a mandamus to the school directors to pay his salary: *held*, that he could not be employed or receive compensation, and that the school directors upon a visit for the purpose, had authority to terminate his powers.

ERROR to the Common Pleas of Lancaster.

The facts of this case sufficiently appear in the opinion of the court below, which was delivered by

LEWIS, President.—This is an application by George D. Dillon for a mandamus. On the 23d June, 1843, he presented his petition to this court, setting forth, among other matters, that before the 9th July, 1842, the township of Conestoga was duly divided into sub-districts under the common school law; that on the said 9th July, 1842, after due notice, Samuel Harmon and others (named in the petition) were duly elected a school committee for one of the said sub-districts, for the term of one year, according to the provisions of the 8th section of the act of 13th June,

1836; that the said committee appointed the petitioner a teacher for said district for the term of five months from the 25th of September, 1842, at twenty dollars per month; that the said petitioner presented himself to the respondents, school directors of said township, for examination, but they declined to enter upon the examination desired; that the petitioner then entered upon the discharge of his duties as teacher in the public school-house of the district, taught the scholars of the district for the term agreed upon, and demanded payment from the school directors, which they refused. The petition concludes with a prayer for a mandamus commanding the school directors to draw an order on the treasurer of said district for the sum of $100, compensation for his services thus rendered. An alternative mandamus was accordingly awarded, commanding the respondents to draw the order, or signify cause to the contrary. On the 21st August, 1843, the respondents made return, as the cause of their refusal (among other matters) that in March, 1842, about three months previous to the time when the said Samuel Harmon *et al.* were elected a school committee, as alleged in the petition, a different committee was elected in pursuance of notice given by the president of the board of school directors and by order of the board; that at the time the board of school directors met in said year to examine persons "as to the propriety of their being employed as teachers in their districts," there were reasons produced before the said board, which the directors deemed sufficient to induce them not to issue their certificate to said Dillon, that he was qualified and of good moral character, one of which reasons "deemed amply sufficient by the said directors," is stated in the return to be a "personal animosity towards three or four families that were to send their children to the school of said sub-district." It is further stated, in the return, that the directors "did not employ said Dillon as teacher" or "sanction his employment in any way;" but, on the contrary, that the said Dillon took possession

of the public school-house, without authority, and refused to give up possession to the said directors, who demanded possession, and informed him that his proceedings were unauthorized and at his peril, and that they would not pay him or authorize his being paid as a teacher. It is further stated, in the return, that the said directors established a common school in said sub-district, in the place of the one they had been thus deprived of, in which the teacher chosen by the committee first elected taught the school, &c.

To this return there was a demurrer and joinder in demurrer, and the case comes before the court for judgment on the record.

In the course of the argument, the opinion of the Hon. Charles M'Clure, secretary of state and superintendent of common schools, was read to the court. That officer is authorized by act of assembly, "to settle and adjust, without cost to the parties, all controversies arising among the directors of any district or adjoining districts, concerning the duties of their office, the distribution of the state appropriation, or the levying and collection of taxes." This is not a controversy "among the school directors." They appear to have no controversy among themselves. But the controversy is between the school directors on the one side, and a person claiming compensation as teacher on the other. It follows that the opinion of the superintendent is not conclusive upon the questions in dispute. It is nevertheless entitled to the most respectful consideration, as disclosing the views of a high and intelligent public officer, whose official duties have necessarily made him familiar with the school system under his charge. It is his opinion that the election of the committee first chosen, to wit: on the 24th March, 1842, was illegal, because notice for the election was given by the president of the board of school directors. The law requires the notice to be given by "not less than four voters of the district." It is also his opinion that the teacher appointed by the committee after-

wards elected, cannot enforce payment of his salary because he has not obtained from the school directors the certificate of qualifications and character, required by law previous to his being employed as a teacher. It is believed, on careful consideration, that the opinion of the superintendent, on both the points stated, is sound, and fully sustained by a fair construction of the acts of assembly.

By the act of 13th June, 1836, section 9, it is declared that when a district shall be divided, "the committee of each sub-district shall have the appointment of the teachers of such sub-districts respectively." But the appointing power, thus conferred upon the committee, must be exercised in subordination to such regulations as have been prescribed by law, and none but persons eligible by law can be appointed. By the act of 1st April, 1834, it was provided that the school inspectors should "examine every person wishing to be employed as a teacher; and, if found qualified, and of good moral character," they were required "to give a certificate to that effect, naming therein the branches which he or she was found qualified to teach;" and it was expressly declared in the same act, that "no person who shall not have obtained such certificate, shall receive any compensation for his services." By the act of 15th of April, 1835, school inspectors were dispensed with, and all the duties of the inspectors were required to be performed by the directors of the several districts. By the act of 21st April, 1840, it was again provided, that "persons wishing to be employed as teachers, should be examined by the school directors, in conjunction with such persons as they may associate with themselves for the purpose, and if found qualified, and of good moral character," a certificate was directed to be issued as previously required by the act of 1st April, 1834; and it was further provided, by the act of 1840, that "no person shall be employed as a teacher unless he shall have procured such certificate."

It is apparent, from these enactments, that the appointing

power, conferred upon committees of sub-districts, was under legislative restriction; and that they were necessarily confined, in their selection, to those who had received from the school directors the proper certificate of character and qualifications. None others were eligible. If they ventured to appoint a person destitute of this certificate, such act could only be regarded, at the most, as a contingent selection, depending for its validity upon the subsequent grant of a certificate by the directors. Without such certificate, he could not legally enter upon the duties of the appointment. By one act of assembly, it was declared that he should not be "employed," and by another it was provided that he should not "receive any compensation for his services." The acts, being in *pari materia*, and not being inconsistent with each other, in regard to the consequences of appointing a teacher destitute of the requisite evidence of character and qualifications, both provisions, on that subject, may be taken to be in force; so that a teacher appointed by a school committee, if destitute of the required certificate, can neither be "employed" in that capacity nor "receive any compensation for his services." His right to occupy the public school-house and his claim to compensation, are both denied. The circumstance of his having acted as the teacher, under an illegal employment, does not therefore entitle him to compensation under the acts of assembly, which are expressly against the claim. The principles of the common law are equally against it. It is true that where strangers are concerned, it is sufficient, for rights depending upon official acts, to show that the acts were performed by the officer *de facto*. But where the officer himself is claiming rights by virtue of his office, he must show that he was legally qualified to act—that he was the officer *de jure* as well as *de facto*. This is clearly the rule where the claim is for compensation for services rendered in such capacity. In *Riddle* v. *Bedford County*, 7 S. & R. 389, it was held that one who had purchased

unseated lands at the treasurer's sales for non-payment of taxes, was not bound to pay the treasurer his fees for his services in advertising, selling and making conveyances of the land, because the treasurer who had rendered the services had not taken the oath required by the constitution to be taken by all officers. The titles conveyed were clearly good, and the acts of the officer unquestionably valid as respects others. But the officer himself could claim no benefit derived from an office in which he had not been duly qualified to act.

But it is alleged that the petitioner presented himself for examination, and the directors refused to discharge their duty in that respect. It would seem from the return, that "the directors met for the purpose of examining persons, as to the propriety of their being employed in their districts." In this step the directors committed an error. It was not for them to inquire, in the first instance, as to the propriety of employing particular teachers, where the district had been divided into sub-districts. The power of appointing teachers belonged to the committee of the sub-district, and that committee was the proper authority to determine upon the propriety of employing particular persons within the sub-district. The meeting of the directors should have been for the purpose of examination touching the qualifications and moral character of persons wishing to be employed as teachers. Granting that the "personal animosity" of the proposed teacher towards "three or four families" of the sub-district, furnished an objection to his being employed in that particular sub-district, it was clearly no objection to his employment elsewhere, and was therefore no reason for withholding a certificate of general character and qualifications, the possession of which was necessary in order that the applicant might seek employment in quarters where no such objection existed. This objection might have been considered by the board of directors, if they found any evil results from it, when acting in their superintending

capacity as visitors. But when acting as examiners, they had nothing to do with the question, and the existence of the reason alleged forms no justification to the directors in neglecting a duty positively enjoined on them by law.

The directors state also in their return, that they refused the certificate "for causes which they deemed sufficient." The "causes" are not stated. The directors are required by law to examine "every person wishing to be employed as a teacher." It appears upon the record that they have refused to perform this duty, notwithstanding that the petitioner "presented himself for examination." Those who accept public employments are bound to discharge the duties required of them by law, or assign such reasons for the refusal as shall be deemed sufficient by the tribunals appointed to decide. It is only where a discretionary power is given to do or omit any particular act, that the omission can be justified by a general averment of causes not specified, but which were deemed sufficient by the party refusing to act. In respect to the duty of examining the applicants, there was no discretion reposed in the directors. The law is imperative, and nothing can justify a refusal to perform it, except a defect in the moral character of the applicant, which would, of course, render unnecessary an examination touching his literary qualifications. When the examination takes place, it must of course be confined to "moral character" and "qualifications." The "qualifications" intended, are "learning and ability" to teach. The legislative enactments, in restraining the inquiries to the "moral character" and "learning and ability" of the candidate, contain an affirmative pregnant with a negative upon all inquiries touching other matters. If the examiners should be permitted to take one step beyond the boundaries assigned by law, it is impossible to tell where ignorance, passion, or prejudice might lead them. Intolerant members of different religious denominations, harmonizing in some particular views, might feel it to be their duty to exclude

others of less numerical strength, from all participation in a system supported by the common means, designed for the common benefit, and emphatically designated in the law as the common school. In a *quare impedit*, the bishop of Exeter returned, as a reason for refusing to admit the patron's clerk, that he was "insufficient in learning," and the return was held to be good. 4 Mod. 140. It does not seem to be necessary to specify in what points the applicant is deficient; a general allegation that he is "deficient in learning" is good. 1 Bl. Com. 390. But where the office is one which requires an adherence to the established church, as a qualification, a return of "*schismaticus inveteratus*," is insufficient. The particular schism must be set out. *Specott's Case*, 5 Coke, 57.

The school directors have not shown in their return that the petitioner was deficient either in "moral character," or in "learning and abilities to teach," and therefore their refusal to grant the certificate, stands upon the record without any justification or excuse. It does not follow, however, that the proper remedy for this injury was a resort to the measures which were adopted by the teacher, under the direction of the sub-committee. In this, as in many other cases, there are faults on both sides. While the directors, without any sufficient cause, were refusing to discharge a duty enjoined upon them, the teacher, equally under a mistake of his rights, established himself in the public school-house without the legal evidence of qualification—refusing to deliver up possession on the demand of the school directors, although notified by them that his proceedings were unauthorized, and that they would not pay him for his services. Although this intrusion into the public rights is not to be justified, it is easy to perceive that it was occasioned by a desire to redress a wrong previously committed by the school directors. Resistance by a subordinate is, however, neither a safe nor a legal remedy for a mistaken exercise of existing authority. The injury

should have been redressed, if at all, by a resort to the laws to compel the directors to make the examination, or to pay damages for the refusal.

It must be remembered that by the act of 13th June, 1836, the school directors are authorized to "establish a sufficient number of schools—to cause suitable buildings to be erected, rented or hired—supply the schools with fuel—fix the compensation of the teachers—direct in which schools persons admitted shall be instructed—pay all necessary expenses, and to exercise a general supervision over the schools in their respective districts." And each "board of directors, by one or more of their number, shall visit every school in the district, at least once in every month, and shall cause the result of said visit to be entered on the minutes of the board." Under the act of 15th April, 1835, transferring the powers of the inspectors to the directors, the latter were required to "visit the schools at least once in every three months, and authorized to visit them as much oftener as they think proper," to inquire into the moral character, learning and ability of the several teachers employed therein. If the directors deem it expedient to divide a district into sub-districts, the committees of the sub-districts "shall have the appointment of the teachers" therein respectively. But all other powers of the committee are to be exercised only upon "the direction of the school directors," under the 14th section of the act of 12th April, 1838. If "directed by the board," they may "attend to all the local concerns, such as visiting the schools, preparing fuel, repairing school-houses." The schools are so dependent upon the arrangements of the school directors, financial as well as otherwise, that the law has wisely given them power to "exercise a general supervision," and has constituted them visitors, making monthly and quarterly visits imperative, and authorizing them to "visit as much oftener as they think proper." And, for the purpose of guarding against conflicting regulations, and securing harmony and

subordination, the existence of sub-districts is made dependent upon their discretion, and all authority within the same, except that of appointing the teachers, is to emanate from them, and to be exercised upon their direction, and not otherwise. The school directors are made the legal visitors of the schools, and they are required to visit periodically. Whether they perform this duty by one or more of their number, or by the sub-committee under their direction, it is still, in intendment of law, the act of the board, and the "result" is required to be recorded on their minutes. It will scarcely be pretended by any one that the "visits" which are enjoined with so much solemnity by the legislature, were intended as mere acts of formal courtesy to the teachers and scholars, or that the "results" which are deemed of sufficient public interest to be recorded upon the minutes, were expected to be of no greater importance than those of a morning or evening call in the social intercourse of society. When the law makers adopt a term of known legal signification, they are presumed to know its meaning, and to use it in the sense in which it is understood by the law. By the common law, the founder of an hospital, college, school, &c., is, of common right, the legal visitor, to see that the property is rightly employed. Where no revenues are given, the sovereign authority giving the corporate or legal existence, has the right to visit as *fundator incipiens.* Where revenues are given, he who makes the donation has the right to visit as *fundator perficiens;* the right descends to his heirs—may be assigned to others—or performed in person. Where the commonwealth is at once the incipient and perficient founder, conferring both the legal existence and the revenues, the right of visitation by such agents as she chooses to employ, cannot be questioned. The common law powers of a visitor are not to be restrained except by negative words. A direction, in a statute, to visit for particular purposes, and at particular times, is no restraint

upon the general authority to visit at other times, and for other legitimate purposes. 4 Mod. 109; 4 M. & S. 415. The visitor is to judge according to the statutes of the college, and to expel or deprive upon just occasions—to hear all appeals of course—from him and him only, the party aggrieved ought to have redress—his determinations are final, and examinable in no other court whatever. He may suspend or deprive for contumacy, for it is requisite to the exercise of his office. His jurisdiction need not be exercised by common law rules. In pleading a sentence or deprivation by a visitor, he need not, in the case of a private founder, show the cause, for that is not traversable. The visitorial power is consequent upon the patronage, by the common law, and is not introduced by any canon or ecclesiastical constitution, and it extends to hospitals, colleges, free schools, &c., not spiritual. If his jurisdiction is limited by rules and statutes, and in his sentence he exceed those rules, an action lies against him; but it is otherwise where he only mistakes in a matter within his jurisdiction. He has no authority to determine matters against the statutes of the realm, for he is a private judge who is to determine only offences against the statute of the college or school where he is visitor, and if he intermeddle in a matter out of his jurisdiction a prohibition lies. These principles respecting the powers of visitors were, in the main, held to be law by Chief Justice Holt, in the case of *Phillips* v. *Bury*, in which he was fully sustained by the parliament upon a writ of error; "and to that leading case," says Sir William Blackstone, "all subsequent determinations have been conformable." 1 Bl. 483; 4 Mod. 106, 123; 13 Ass. pl. 29; Rast. Ent. 1, 2; 7 E. 354; 4 Mod. 110; Cas. Parl. 43; 7 Com. Dig. 568; 2 T. R. 290; 4 Mod. 238, 241, 369; Noy, 91; Carth. 93; 4 Wheat. 518; 2 Kent, 302–3–4. The president of Magdalen college was deprived by the bishop of Winton, who was the legal visitor, and no appeal was allowed. Dr. Bury, the rector

of Exeter college, was deprived by the bishop of Exeter, who was visitor, and the sentence was held to be conclusive. The warden of a lay hospital was deprived by the visitor, and it was held by Herle, chief justice of the common pleas, that whether the sentence of deprivation were right or wrong, was not examinable in that court.

It is not necessary, in this case, to determine how far the acts of a board of school directors in their supervisory and visitorial capacity, are examinable in the courts of justice. In cases where the revenues are provided by the public, and the rights of the whole community involved, these agents of the commonwealth are doubtless amenable to the proper tribunals, when they transcend their authority or violate the laws of the land. 2 Kent, 303–4. But under the power which has been conferred upon the school directors to supervise and to visit, there is no doubt that upon a visit for the purpose, they may correct all abuses in the school, and may suspend or deprive a teacher, whenever, in their judgment, the interests of the system require such a measure. Upon suspending or dismissing a teacher for just cause, it is their duty, in the case of a sub-district, to give notice to the committee of the sub-district, in order that the latter may appoint another; and only on their failure to do so, could the power of appointing a teacher be exercised by the directors, as in the case of a lapse, by virtue of their general authority.

The office of visitor is one of great responsibility, with jurisdiction and powers recognised by the common law, and, by the acts of assembly, conferred upon the directors. These remarks, in regard to the duties of that office, and the powers of the school directors, have been made because the subject is one of much general concern—because the duties of the office do not appear to have been properly performed on the one side, or its authority sufficiently respected on the other; and because an impartial discharge

of its duties and a just respect for its authority, is absolutely necessary for the well ordering of the general system of education established by law.

It must be remembered, however, that the present is not an application by the teacher to compel the directors to examine him and grant a certificate of character and qualifications. Nor is it an action against them to recover damages for their refusal to do so. The application before us, is to compel them to draw their warrant in his favour for compensation as teacher; and the objections to it are twofold. In the first place, the acts of assembly are express, that the applicant destitute of a certificate is neither entitled to be "employed," nor to "receive compensation." In the second place, he could not legally hold the office of teacher, and the possession of the public school-house, after his powers had been suspended or terminated by the decision of the school directors, upon a visit for the purpose. Although the proceedings of the directors, upon coming to the school-house, in demanding possession, and in giving notice that the acts of the teacher were unauthorized and at his peril, may have been informal, it is but fair to consider them a substantial exercise of their legitimate powers of supervision as visitors. As such, their determination ought to have been submitted to, until redressed, if illegal, by due course of law. It is much better that even an unjust sentence be submitted to, until legally reversed, than that a subordinate agent should be permitted to take the law into his own hands—be the judge in his own cause—take possession of the public property—and resist the decision of those whom the law had clothed with superior authority.

It is the opinion of the court, upon this demurrer, that judgment be entered for the respondents with costs.

Stevens, for plaintiff.
Parke, for defendants.

The plaintiff sued out a writ of error upon this judgment; and on the 29th of May, 1844, after argument, the supreme court affirmed the judgment of the court below.

Judgment affirmed.

Graham *v.* Eichbaum.

[SEPTEMBER, 1844.]

On the trial of an issue on a plea in abatement by N. sued alone, on a note signed "N. & W.," for the non-joinder of W.; the said W. is not a competent witness for N., although released by him from all costs or damages growing out of the suit.

THE *narr.* set forth that the defendant, N. Graham, made said note, "by the name of N. & W. Graham."

The defendant pleaded in abatement the non-joinder of W. Graham. The plaintiff replied, that defendant was solely liable. Issue, &c.

On the trial, the plaintiff proved the execution of the note by the defendant, and its endorsement to the plaintiff. He also proved the publication by the defendant, in a newspaper, of a notice stating that at the time of giving said note, there was no such firm in existence as N. & W. Graham.

The defendant offered the said W. Graham as a witness; who was objected to by the plaintiff as interested, because, upon a judgment in this case, if it is a partnership debt, the partnership goods might be seized. The defendant then executed a release to the witness "from all liability for costs or damages growing out of" this suit, and again offered him as a witness. The plaintiff still objected to him as incompetent. The court sustained the objection—excluded the witness, and, at defendant's request, sealed a bill of exceptions.

The only error assigned was, the rejection of W. Graham as a witness.

Patterson, for plaintiff in error, cited 1 Stark. Ev. part 4, p. 1084; 2 Stark. Ev. 414, 3d Am. ed.; 4 Maull & Selwyn, 475; 4 Taunt. 752; 3 Cowen, 84.

Veech, contra, referred to *Taylor* v. *Henderson*, 17 S. & R. 453, 456; *Black* v. *Marvin*, 2 Penn. Rep. 138; *M'Coy* v. *Lightner*, 2 W. 347, 351; *Carter* v. *Connell et al.* 1 Wh. 392, 398.

Per Curiam.—Judgment affirmed.*

Campbell *v.* Gregg.

[April 29, 1848.]

If bail in error be not perfected within ten days after exception, the writ of error may be *non prossed*.

Rule to show cause why *non pros.* should not be taken off. The writ of error had been *non prossed* on the 19th of April, 1848. It appeared, that exception to the bail in error had been filed on the first of April, and notice given to justify within ten days, under the rule of court; (which directs the prothonotary, in default of justification, to *non pros.* the writ of error;) on the 12th of April, one of the bail justified, without notice to the other party.

The court, on the authority of *Taggart* v. *Cooper*, 3 Binn. 34, discharged the rule, and refused to take off the *non pros.*

* See 1 Greenl. Ev. § 395, and cases there cited, sustaining the point decided in this case.

Commonwealth *v.* Demain et al.

[JANUARY, 1846.]

The production of an abortion or miscarriage is an offence at common law.

A defect or error in the setting forth of a defendant's name in an indictment is only pleadable in abatement, in which the defendant must give a better name; and is not cause for demurrer.

It is not necessary, *it seems*, in an indictment for the production of an abortion, to aver *quickness* on the part of the mother; it is sufficient to set forth that she was "big and pregnant."

A misjoinder of counts is not cause for demurrer; the proper course being for the defence, in such case, to ask the court before trial to put the prosecution to an election.

In a prosecution for conspiracy, it is in the discretion of the commonwealth to include as many of the alleged co-conspirators in the indictment as it may deem expedient; and the non-joinder of any such, provided there are enough alleged on the record to constitute the offence *aliunde*, is not matter for demurrer.

CERTIORARI to the Oyer and Terminer of Philadelphia.

An indictment was found against the defendants at the May sessions, 1845, in the court of oyer and terminer, &c., for the city and county of Philadelphia, containing seven counts, which were substantially as follows:

The first count charged that the defendants, "together with —— Ford, yeoman," &c., did make an assault on one S. S., "then and there being big, pregnant and quick with child," and a certain instrument made of silver, &c., in the shape and form of a hook, up and into the womb and body of the said S. S., &c., did thrust," &c., "with intent to cause and procure the said S. S. to miscarry, abort and bring forth the said child, of which she was big, quick and pregnant, as aforesaid, dead," &c.; and then proceeded to aver, that in consequence of such assault, &c., the said S. S. miscarried, &c. The second count was the same, with the omission of the allegation of quickness. The

third was the same as the second, so far as the assault, with the omission of the allegation of a subsequent miscarriage. The fourth was for a mere assault. The fifth was for a conspiracy to commit the offence as described in the third count. The sixth was for a conspiracy to commit the offence as described in the third count, with an allegation of an assault made in execution of the conspiracy, and a subsequent miscarriage. The seventh was the same as the sixth, with the omission of the final averment of miscarriage.

On July 8th, 1845, the defendants filed a special demurrer, in which, after the defendant, Demain, protesting that her name was Ford, and that she was a married woman, and not single, as the indictment alleged, the following reasons were specified:

1. Because to the third defendant, Ford, no Christian name was given. 2. Because, in the second count, there was no averment of quickness. 3. Because two counts were without proper conclusions; a reason which was abandoned on argument. 4. Because counts for conspiracy, assault, &c., constituting distinct misdemeanors, were improperly joined. 5. Because Susannah Shoch, by whose sole means the indictment alleged the conspiracy to have been executed, was not included as a defendant.

After a joinder in demurrer on the part of the attorney general, an application for a *certiorari* was made to the supreme court by the counsel for the defendants, backed by an opinion that the questions arising on the demurrer "were of such a nature as to render it proper to have them submitted to the judgment of the supreme court;" and on July 9th, the writ was specially allowed by Mr. Justice Kennedy. The case was argued before the court in banc in December term, 1845.

Mr. Barton and *Mr. O. F. Johnson*, with whom were *Mr. Hazlehurst* and *Mr. Rawle*, for the demurrer.

[Commonwealth *v.* Demain.]

1. The omission of a Christian name to defendant Ford, is fatal. 2. The second, third, fifth, sixth and seventh counts are defective, in containing no allegation of quickness in the mother, such quickness being necessary to the constitution of the offence. *Com.* v. *Bangs*, 9 Mass. 387; 1 Russ. on Cr. 671; 1 Hale, 434. 3. Counts for distinct misdemeanors are improperly joined. *Updegraff* v. *Com.* 6 S. & R. 10. 4. The omission of Susannah Shoch as a defendant, she being a necessary co-conspirator, is fatal.

Mr. F. Wharton and *Mr. Kane*, attorney general, *contra.*

1. Misnomer can only be met by plea in abatement, disclosing the defendant's real name. *Com.* v. *Dedham*, 16 Mass. 146; *Turns* v. *Com.* 6 Met. 225; *Com.* v. *Cherry*, 2 Virg. Cases, 20; *State* v. *Bishop*, 16 Maine, 122. 2. The destruction of a child in *gremio matris*, was a murder at common law. 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 31, § 16; 1 Russ. on Crimes, 671; 1 East. P. C. 227; and the distinction taken in Massachusetts as to quickness, has been recognised nowhere else. Ibid.; Bracton, lib. 3, § 21; Guy's Med. Juris. tit. 'Abortion;' 1 Beck, 172, 192. At every period of gestation, the rights of an infant *en ventre sa mere* are equally respected. 2 Vernon, 710; *Doe* v. *Clarke*, 2 H. Bl. 399; 2 Vesey Jr. 673; *Thelusson* v. *Woodford*, 4 Vesey Jr. 340; *Swift* v. *Duffield*, 5 S. & R. 38. 3. Nothing is more common than to join counts for a misdemeanor with counts for a conspiracy to commit a misdemeanor. 3 M. & S. 550; *Com.* v. *Gillespie*, 7 S. & R. 476; 1 Ch. C. L. 255. 4. Even if the woman who was the subject of the offence were a *particeps criminis*, it is optional for the prosecution to withdraw her from the indictment, and to proceed against the remaining parties. *R.* v. *Lord Grey*, 3 State Trials, 519; *Mifflin* v. *Com.* 5 W. & S. 461; see *People* v. *Mather*, 4 Wend. 231.

[Commonwealth v. Demain.]

The opinion of the court was delivered by

SERGEANT, J.—We see nothing in any of the points taken by the defendants in demurrer. 1. This exception is only pleadable in abatement, in which the defendant must give a better name. It is not cause of demurrer. 2. The indictment is in proper form, and sufficiently avers that she (the party injured) was pregnant and quick with child, which was destroyed and killed, &c. 3. This exception is not true in fact. The indictment contains but seven counts, with the usual conclusions. 4. This exception is not cause of demurrer. If the counts are improperly joined, the court may be asked to interfere before trial, and put the commonwealth to its election. 5. The name Ford alone, there being no plea in abatement, is not a nullity; and as to inserting Susannah Shoch as a party, that rests with the prosecution. Two or more may be indicted for conspiracy with others not parties.*

* It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of a woman. And it is sufficient, in the indictment, to charge an intent to procure the miscarriage and abortion of the mother, and the premature birth and destruction of the child, of which she was then pregnant. It is not necessary, in such an indictment, to aver *quickness* on the part of the mother; it is sufficient to set forth that she was big and pregnant. *Mills* v. *The Commonwealth*, 1 Harris, 631. When a female is with child, and a potion is administered to her for the purpose of destroying the child, which produces the death of the mother, it is murder in the second degree; unless there existed in the perpetrator an intent to take away the life of the mother, as well as to destroy the offspring; in which case it would be murder in the first degree. *Com. ex rel. Chauncey et al.* v. *The Keeper of the Prison*, 2 Ash. 227.

Wilson et al. *v.* Brechemin.

[April 6, 1846.]

The action of covenant lies only against a party who has sealed and delivered the instrument.

A. being the holder of a mortgage, brought an action of covenant against B., the assignee of the mortgagor, to recover the difference between the mortgage debt and what the property sold for. *Held*, that no covenant being sealed by the defendant, the action would not lie.

Error to the District Court for the city and county of Philadelphia.

This was an action of covenant brought by John M. Wilson and Isaac Severn against Lewis Brechemin, to recover the difference between the amount of a mortgage, subject to which certain property had been sold, and the proceeds of a sheriff's sale thereof, the defendant having bought the property under and subject to the payment of the mortgage.

The plaintiffs alleged, that the purchase of the property by the defendant, subject to the mortgage, created a covenant on the part of the defendant, which the plaintiffs, as owners of the mortgage, were entitled to the benefit of, and which the defendant had broken by non-payment of the difference between the said debt and what the property sold for.

To the plaintiffs' declaration, the defendant had filed a general demurrer, and also demurred specially, showing for cause, want of privity of contract between plaintiffs and defendant.

Upon argument, in the court below, judgment was rendered for the defendant on his demurrer, and this was assigned for error.

Keemle, for plaintiff in error, cited 16 S. & R. 167; 17 S. & R. 94.

Troubat, contra.

PER CURIAM.—There is no covenant sealed by the defendant, and consequently there is no cause of action.*

* In *Maule* v. *Weaver*, 7 Barr, 329, A. conveyed to B., by a deed recited to be an indenture *inter partes*, to which they had interchangeably set their hands and seals: in the deed was contained a covenant on the part of B. to pay A. a rent reserved out of the land: A. alone sealed the deed, and B. accepted the deed and entered, and by a subsequent deed conveyed the land subject to the rent: *held*, that covenant does not lie against B., because he did not seal the deed. "How it came to be thought by the profession at an early day, and handed down to the present," said Chief Justice GIBSON, "that an action of covenant might be maintained against the grantee in a deed poll under any circumstances, or against any one else who had not sealed it, I cannot imagine. Though the principle has been recognised as a general one it seems to have been thought that in all cases where a grantee takes an estate by a deed poll, he may be compelled to perform the conditions of the grant by an action of covenant, instead of an action of debt or assumpsit; and this supposition had its root in the case obscurely stated in Co. Litt. 331 a; but it is clearly shown by Mr. Platt, the only lawyer who has searched the original roll, that there has been a prodigious misconception of the language of Lord COKE, which was predicated, not of an action of covenant, but of an action of debt. Yet the same misconception existed in the mind of Chief Justice ABBOTT, in *Bennett* v. *Lynch*, 5 B. & C. 589, by which, however, he affirmed the principle to which he supposed the case put by Lord Coke to be an exception. But the singularity of the exception ought to have sent the profession to the year-books for the original cases to which references were given, and in which they would have found that the action in each of them was not covenant but debt. It ought to have occurred to them that forms of pleading are touchstones of the law, and that the most dexterous pleader would find himself unable to make a successful profert of a deed poll as the act of one who had not sealed it. Mutual covenants may be contained in the same instrument; but each party must seal and deliver his own, exactly as if they were contained in the several parts of it." 7 Barr, 331.

Com. ex rel. Dougherty *v.* Biddle.

[DECEMBER, 1846.]

The enlistment of a minor into the army of the United States, under the act of 1847, (ten regiment bill) without the consent of his parent or guardian, is illegal.

The supreme court granted a *habeas corpus*, at the instance of the parent, and discharged the minor, though the same matter had been fully heard before a judge of the court of common pleas, and the discharge refused with the consent of the minor.

The court, in such case, has no authority to compel a return of the bounty or clothing received from the United States.

THIS was a *habeas corpus* directed to Captain Biddle, commanding him to bring up the body of one Dougherty, which writ was issued at the instance of his father. A return was made by Biddle, as captain in the United States army, stating, that on the 10th of March, a writ of *habeas corpus* issued out of the common pleas, and that said Dougherty was before said court, and being of years of discretion, and declaring in open court that he desired to remain with respondent as a soldier in the service of the United States, the said court, after a full investigation, remanded him, &c., and that nothing has since occurred to alter the circumstances of the case.

Mr. O'Neil, for the relator.—We deny the last part of the return. The court discharged him in the first instance, then remanded him, and this writ was taken to test the right of the subsequent holding.

[PER CURIAM. You cannot inquire into the truth of the return, but are put to your action for a false return.]

Mr. Pettit, for the United States.—The case has been once solemnly decided by a court of competent jurisdiction, and the question is, will this court entertain this second

application? A full examination was made, and the order was, "That the said Dougherty being brought up, and stating in open court, after a full hearing, and being informed of his rights, he elected and chose to remain in the custody of the respondent, (Captain Biddle) under his enlistment; therefore, under the facts disclosed, the court refuse to discharge him."

[GIBSON, C. J.—It is in the discretion of this court to do it. It was done in a case in which I was concerned when at the bar,—the court had no hesitation.]

Will you use the discretion under the circumstances?

[PER CURIAM. If we see the court has decided erroneously.]

The New York cases consider it *res judicata*.

[PER CURIAM. The rule has been settled differently in this state. There is a case in Binney's Reports to that effect.]

The cases are so; but in no instance reported has a discharge been granted.

[GIBSON, C. J.—Proceed on the original grounds; let us have the proofs.]

The father of the boy was then called, and proved that his son was nineteen years old in December last,—was at school at the time he enlisted,—was not learning a trade, but worked in the summer at the brick yards,—that he never assented to the enlistment.

The court refused to hear evidence of the reasons of the decision of the court before which the case was formerly heard.

Mr. Pettit, district attorney, admitted there was no authority in the acts of congress for the enlistment of minors without the consent of their parents, the act of 1814 having been repealed, and the present act reviving the limitations contained in the acts of 1812, and 1815, Pet. Stat. at large, vol. ii. 133; vol. v. 225. He contended that this was not a case for the interference of the court, as the

boy was of sufficient age to choose for himself, and had deliberately made a choice,—especially as the parent had made no provision for instructing him in any trade.

PER CURIAM.—We discharge the boy out of the custody of Captain Biddle.

It being suggested that he had received bounty and clothing from the United States, the court said they had no power to award a return thereof.*

* In *Com. ex rel. Webster* v. *Fox*, 7 Barr, 336, the court not only affirmed the doctrine of the above case, but discharged the minor, although the return to the writ stated that he had deserted and subsequently surrendered himself as a deserter; and that the matter had been decided by the court of common pleas. Mr. Justice COULTER, who delivered the opinion of the court, held, that the circumstance of the minor having left the custody of the officer, or deserted, made no material difference in the case: the contract of enlistment under the circumstances, (the minor having a father who was entitled to his services) was not binding on him, and he might leave the service. It might possibly make a difference if the minor were under arrest for the crime of desertion, and in process of trial by a court martial for the offence. But even then, a person unlawfully enlisted, and held without authority of law, could only be amenable to military punishment for desertion in the presence of an enemy, or in an enemy's country.

In the *Case of Veremaitre et al.*, JUDSON, J., *held*, that a state court has no jurisdiction, on *habeas corpus*, to discharge a soldier or sailor held under a law of the United States. 3 Am. L. J. 439.

Com. ex rel. Meconkey et al. *v.* Rogers.

[JANUARY 17, 1848.]

A judgment creditor who issues a *scire facias* to revive his judgment within five years, but after the real estate of the debtor was conveyed to another, and causes it to be served upon the judgment debtor and the purchaser as terre tenant, thereby continues the lien of his judgment, if he prosecute his writ of *scire facias* with due diligence.

But if the real estate of the debtor be sold by the sheriff before the judgment of revival be obtained, the land is discharged from the lien of the judgment, and the creditor cannot proceed to judgment of revival against the land so discharged from the lien, but must look to the proceeds of sale.

A judgment in favour of one firm against another firm where one of the partners is a member of both firms, may be sustained under the act of 14th April, 1838, and is a lien on the separate real estate of such partner; but his separate estate cannot be seized until the accounts are taken, and the equities settled between the parties.

A judgment against one partner, in a suit against two, without any service or return of *nihil habet*, &c., against the other, is erroneous; but a *bonâ fide* payment of such judgment by the sheriff, out of proceeds of land sold by him on which it was a lien, is a protection to the sheriff in an action brought against him by the judgment debtor or his subsequent judgment creditors, after a reversal of the judgment.

ERROR to the Common Pleas of Chester county.

The judgment of the court below was affirmed in this case, the supreme court being equally divided. The cause was ruled in the common pleas by Mr. Justice Bell, before his appointment to the supreme bench, and he did not therefore sit in the cause. The facts are fully stated in the opinion of the court below.

BELL, President.—The first question raised by the special verdict is, whether the defendant, as sheriff, properly paid out of the fund in his hands, proceeding from the sale of the real estate of George W. Pennock, the amount of the judgment recovered by William & Alexander Mode against

Moses & Jesse Coates, and revived by *scire facias* and judgment therein, rendered on the 22d of April, 1837? Land bound by the lien of this judgment was, in 1839, conveyed by Jesse Coates, one of the defendants therein, and his wife, to George W. Pennock, who continued to be the owner thereof, until it was, with other lands, sold by the defendant as sheriff, on the 28th of October, 1842. Before the expiration of the lien, to wit, on the 18th day of April, 1842, an *alias scire facias* for its further revival was issued against Jesse Coates, and Pennock, as *terre tenant*, which was served on both of the defendants, on the 22d of the same month; and at May term following, a judgment for default of appearance was taken against Coates, but Pennock, the tenant, causing an appearance to be entered for him, no judgment was signed, as against him, nor were any further proceedings had, up to the time of the sale of the land bound. Under these circumstances, did this judgment continue to be a lien on the land sold, in the hands of the *terre tenant*, up to the time of sale? If this question is to be answered in the affirmative, it is conceded the payment made by the sheriff in satisfaction of the judgment was rightly made.

By the second section of the act of 4th April, 1798, no judgment is to continue a lien on the lands of the defendant for a longer period than five years, unless the plaintiff shall, within that term, sue out a writ of *scire facias* to revive the same.

By the third section of the same act, such writs of *scire facias* are to be served on the *terre tenant* of the real estate bound by the judgment, and it has been determined that where land, as here, has been aliened by the defendant in the judgment, within the period of five years, and no *scire facias* served on the *terre tenant*, or notice given him of such writ, within that period, the lien of the judgment is gone as against him, and the land in his hands; and this though the original defendant may have confessed a judgment of

revival within the statutory term, (*Clippinger* v. *Miller*, 1 P. R. 64; *Lusk* v. *Davidson*, 3 P. R. 229.) But, in the present case, the *terre tenant* was named in the writ of *scire facias*, and it was duly served on him. There can, therefore, be no complaint on the score of notice. But, notwithstanding this, it is said that, as against subsequent encumbrancers, in order to continue the lien of the judgment, the *scire facias* must be prosecuted to judgment, although the language of the act of 1798, taken literally, would seem to contemplate a revival, from the mere fact that the writ prescribed by it had been issued. On the authority of *Vitry* v. *Dauci*, 3 R. 9, this position may be conceded, with this qualification, however, that where a defendant or *terre tenant* appears, upon the return of the writ, the plaintiff will be entitled to a liberal share of indulgence as to time, within which to prosecute his suit to judgment. In such case, the lien of the original judgment will not be lost, except for laches and neglect of reasonable pursuit, and a failure to obtain a judgment in the *scire facias* before the expiration of the five years will not of itself defeat the lien. In the case decided, a period of seven years was permitted to elapse between the initiation of the process and its consummation, and this though the defendant did not appear. (See also *Cowden* v. *Brady*, 8 S. & R. 505.) This was justly held to be such negligence as postponed the party to subsequent mortgagees and judgment creditors. But no such neglect is observable here. The *scire facias* was returnable to May term, and the land bound sold in October, 1842. But one term elapsed in the interval, at which the plaintiff, using the utmost diligence, under the rules and practice of the court, could not have forced a trial. Add to this that pending the *scire facias*, the process of execution against Pennock must have been progressing; and indeed it seems that one portion of his property was sold as early as July.

Now if, as has been decided, under the circumstances

which obtained, a liberal indulgence is to be extended to the judgment creditor in prosecuting his suit for a revival to judgment, it cannot, I think, be said, with any show of reason, that up to the time of the sale of the land, this indulgence was exceeded. But it is said, it was the duty of the creditor to pursue his suit to judgment, even after sale. But wherefore? The land was discharged by the judicial sale, and the creditor was bound to look to its proceeds as the fund from which he was to be paid. In the analogous case of a mechanic's lien, it was held, in *M'Laughlin* v. *Smith*, 2 Wh. 122, that the lien creditor, though bound to issue his *scire facias* within a given time, cannot proceed to judgment of revival after the lien has been discharged by a sale of the land, and that he is not bound to prosecute to a judgment, merely for costs. The same doctrine is asserted in *Com.* v. *Gleim*, 3 P. R. 417. In this there is reason as well as authority. Nor, as was argued for the plaintiff, was the sheriff bound to keep the funds in hand, until the *scire facias* was brought to judgment, in the absence of notice or intimation from any one—judgment debtor or subsequent lien creditor—that the judgment in favour of Mode was contested. Indeed, no one but the defendant would have been permitted to take defence, except on the ground of collusion and fraud in the concoction of the judgment, which is not suggested—and if *he* wished to resist the application of the proceeds of his land to its payment, he ought, in my opinion, to have given notice of a defence to the sheriff, and pleaded to issue. Under the facts and circumstances of the case, it was as much and more his duty to bring the case to issue by pleading to the *scire facias*, than it was the duty of the plaintiff to call upon him to do so. He did not do so, nor does he now suggest any defence or ground of resistance to the judgment, and it is going too far to call upon us to presume the existence of such a defence, upon the suggestion of other creditors, who recovered their respective judgments with an eye to and subordinate to this prior lien.

Nor is there any thing in the idea thrown out on the argument, that the plaintiff, Mode, by signing a judgment by default against Coates, discharged Pennock's land of the lien, or in any way affected its liability. On the contrary, the constant and correct practice has been, where two or more are sued, and some appear, and others do not, to take judgment against those who fail to appear, and then rule the others to issue; or you may, after issue joined, sign an interlocutory judgment against those making default, and the verdict rendered on such issue, ascertains the amount due from all. *Marshal* v. *Gougler*, 10 S. & R. 164; *Nelson* v. *Lloyd*, 9 W. 22; *Ridgely* v. *Dobson*, 3 W. & S. 123.

I do not see, therefore, that the defendant violated any legal propriety in paying, as sheriff, out of the fund in his hands, the judgment in favour of Mr. Mode.

But another and more difficult question remains. Is the act of the sheriff, in applying a portion of the funds in his hands, arising from the sale of George W. Pennock's lands, in payment of the judgment recovered against him by the firm of Swayne & Pennock, to be justified in this suit?

The judgment rendered by this court, upon the verdict of a jury, in *Swayne & Pennock* v. *Pennock*, was reversed by the supreme court, more than a year after its rendition, upon a point not made, nor in any way brought to the notice of the court below. Of the defect in the record, upon which the judgment of reversal proceeded, as a legal objection to the validity of the judgment, every one interested in the estate bound by it, appears to have been profoundly ignorant, each and all regarding it as a good judgment and effective lien, at least up to April, 1843, when the writ of error was sued out. Long before this, to wit, in November, 1842, the defendant, as sheriff, had paid out the funds in his hands to the several lien creditors of George W. Pennock, and, among the rest, in satisfaction of the judgment now in question. Then, and after the sheriff had parted with the whole amount of the fund, came the reversal.

But if the judgment was a lien on the land of the defendant in it, at the time of the sale of that land by the sheriff, he was right in paying it out of the proceeds at any time before reversal, and the subsequent reversal gives no title to the defendant, or any one else, to call on the sheriff to repay, out of his own pocket, the amount disbursed by him, on the faith of a recorded judgment of the court of which he was the officer; especially in the absence of any notice that its validity was questioned, or of an intention to sue out a writ of error. Notwithstanding the strong language used, in reference to this judgment, by Mr. Justice Huston, when delivering the opinion of the court, in *Pennock v. Swayne*, 6 W. & S. 241, it must be held to have been merely irregular and voidable, and not void; but good and binding, as the judgment of a court of competent jurisdiction, until reversed. *Lewis* v. *Smith*, 2 S. & R. 142, 156; *Martin* v. *Rex*, 6 S. & R. 296. In such case I take the rule to be undoubted, except under extraordinary circumstances:—the only remedy for the plaintiff in error is by award of restitution against the plaintiff in the execution, if he have received the money; and even this is in the discretion of the court, and will not be accorded where equity and good conscience forbid it. Treatise on Sheriff Law, 46 Law Lib. 207–8, 255, 301; 2 Salk. 587; 2 Tidd's Pr. 933–4–5–6; 2 Saund. 101; 2 Bac. Abr. by Bouv. 389, tit. Error, 3; *Fitzalden* v. *Lee*, 2 D. 205, S. C., 1 Y. 207; *Baker* v. *Smith*, 4 Y. 185; *Cassell* v. *Cooke*, 8 S. & R. 296; *Kirk* v. *Eaton*, 10 S. & R. 103; *Willard* v. *Norris*, 2 R. 63; *Smith* v. *Sharp*, 5 W. 292–3. And why should it be otherwise? A judgment of a court of competent jurisdiction cannot be treated as a nullity, except perhaps for fraud and collusion in the procurement of it, and to secure a fictitious debt. Every judgment standing upon the records of a court of record, is to be treated as a subsisting one, however irregular upon its face. *Hays* v. *Shannon*, 5 W. 548; *Hazelett* v. *Ford*, 10 W. 103; 3 S. & R. 141.

If so, the sheriff is bound to pay it, and may be subjected to a suit, if he do not. It is true, he may pay the money into court, but this is seldom done, and never, in this district, unless notice be given of conflicting claims, or that the judgment creditor's right to receive, is to be in some way contested. *Meason's Estate*, 4 W. 345; *Leeds* v. *Bender*, 6 W. & S. 315. Nay, the pendency of a writ of error will not, I conceive, bar the creditor of his right to receive the amount of his judgment; unless under peculiar circumstances, *Graham's Appeal*, 4 W. 43; such, perhaps, as the insolvency of the creditor; and this exception would proceed upon the non-liability of the sheriff in case of reversal. But were it otherwise, I take it to be settled, that strangers to the judgment, as subsequent encumbrancers, cannot take advantage of such reversal by calling on the sheriff, in a collateral action, to make good the sum paid in discharge of the reversed judgment. These can only impeach the judgment collaterally for fraud and collusion in its concoction to secure the payment of a fictitious debt, which might otherwise sweep away their means of payment. *Hays* v. *Shannon; Hazelett* v. *Ford*, supra; *Haver's Appeal*, 5 W. & S. 473, overruling *Ulrich* v. *Voneida*, 1 P. R. 250; *Stewart* v. *Stocker*, 13 S. & R. 204. Such creditors would not, I think, be for a moment listened to, should they demand restitution to be awarded against a sheriff, or even against the plaintiff in the execution, founded on a judgment reversed for irregularity.

There is, therefore, nothing springing from the mere fact of the reversal of the judgment recovered in *Swayne et al.* v. *Pennock*, which can give the plaintiff a title to recover any thing in this action.

This brings us, unembarrassed by these considerations, to the main question:—Was this judgment, before its reversal, a lien on the private and particular estate of George W. Pennock?

Notwithstanding the suit brought by Swayne and Pen-

nock proceeded against George W. Pennock alone, his co-partner not being summoned, yet the judgment rendered must be taken as against the partnership of which George and Joel were the members, under which the partnership estate and effects, if any, might have been levied and sold. The fact that Joel was not summoned, did not make it less an action against the firm, and for a firm debt, than if both partners had been parties to the record. *Taylor* v. *Henderson*, 17 S. & R. 455. The judgment recovered is, then, in favour of one firm against another firm, one of the members of both being a plaintiff and also a defendant. This brings the case within the decision in *Tassey* v. *Church*, 6 W. & S. 465, which ascribes to such a judgment an anomalous character, distinguishing it in its legal attributes and effects, at least for some purposes, from the ordinary judgment at law, in actions *ex contractu*. If, looking to that decision and giving it a candid construction, I was forced to the conclusion that it determines, a judgment recovered in an action given by the first section of the act of 14th April, 1838, is not, for any purpose, a lien upon the separate real estate of the defendants, partners, but must be viewed simply as a means of reaching the partnership effects, and nothing beyond, I should feel constrained to say the plaintiffs are entitled to recover in this action; however hardly such a recovery might operate against the defendant under all the circumstances that have place here. In such event, there would, in my apprehension, be found in the case, no equitable estoppel, springing from the silent acquiescence of the creditors in the distribution of the moneys, or from want of notice that the right of the creditor firm to receive any part of the proceeds of sale would be contested, sufficient to protect the sheriff. Silence will not estop unless it be fraudulent, and it is never so where it results from ignorance, or the fact is equally within the knowledge of both parties. *Alexander* v. *Kerr*, 2 R. 89; *Robinson* v. *Justice*, 2 P. R. 19; *Smith* v. *Black*, 9 S. & R. 146.

Nor, am I inclined to think, would he find any defence in the fact that the judgment was docketed against George W. Pennock alone, and the certificate of the prothonotary delivered to the sheriff, indicated it as a several judgment, for, to say nothing of actual notice at the time of the service of the summons, it is the duty of the sheriff, who undertakes to distribute the fund raised by him on execution, to look to the whole record of the several judgments. If he had done so in this instance, he would have learned the original form of the action. So, too, in the contingency I have supposed, I should strongly doubt whether there was any such ratification of the acts of the sheriff, in the acceptance of costs by the subsequent judgment creditors, as would bind them; or any thing amounting to a positive agreement that the amount in the sheriff's hands should be distributed in a particular way, including the payment of the *Swayne* v. *Pennock* judgment, as was the case in *Latimer's Estate*, 2 Ash. 524; *Pennepacker's Estate*, C. P. of C. C., Dec. 1841, and *Aycinena* v. *Perries*, 6 W. & S. 251. But let it be conceded or shown that the judgment recovered by Swayne & Pennock was a lien on the land of George W. Pennock, for any purpose, and the whole case assumes a different aspect.

Whether it was so or not, prior to its reversal, is, notwithstanding *Tassey* v. *Church*, I think, an open question. It is certain, the reasoning of the very learned judge, who delivered the opinion of the court in that case, unless very narrowly scanned in every part, would apparently lead to the conclusion that such a judgment was without the quality of lien upon the private estate of the individual partners; for if there can be no levy by execution, it would seem an almost necessary corollary, there can be no lien. But since the argument of the case at bar, I have been favoured with a pamphlet, printed and published under the sanction of Judge Grier, who decided the case below, containing a full report of *Tassey* v. *Church*, including the

opinion of the judge, as well as the opinion of Gibson, C. J., as originally delivered. On consulting this, it will be found that Judge Grier, whose decision, and the reasoning upon which it is based, was before, and affirmed by the supreme court, although he determined that the creditor firm could not then levy on the private estate of one of the debtor firm, expressly reserved the question whether the court would not order the judgment to remain as a security for such sum as Church might thereafter recover against Tassey, in an action of account render, or by bill in chancery. But what is, perhaps, more to the purpose, in the opinion of the supreme court as originally delivered by Gibson, C. J., the concluding sentence, as we now have it in our reports, is omitted. That opinion at first ended thus: "We are of opinion, therefore, that the levy was properly set aside; and that Tassey's separate property cannot be touched by execution."—But, afterwards, as it would appear upon reflection, the sentence was added to, and it now reads, "Tassey's separate property cannot be seized till the accounts are taken and the equities settled between the defendants." This superadded clause controls the generality of the previous reasoning, and shows, I think, that the judgment may be considered as possessing a power beyond the mere settlement of the general question of indebtedness between firm and firm, and its supposed capacity to subject only the joint effects to seizure. If the separate property of a defendant partner cannot be seized till the accounts are settled between him and his partner plaintiff, it follows that, if upon such settlement, the former be found indebted to the latter, his separate estate may be seized for, at least, the amount so found due, and if this estate be in realty, why may it not be taken in execution by virtue of the judgment? In a case like the present, there is no incongruity or impropriety, legal or equitable, in holding the judgment to be a lien, standing as security for what shall be eventually found due, looking to the equities of all

the parties. On the contrary, so to hold is in accordance with the general law which makes recorded judgments liens upon every interest which a defendant has in land, amounting to an estate. Upon this point, the provision of our act of 1836, (copied, in this particular, from the old act of 1810) that every award entered by the prothonotary shall have the effect of a judgment from the time of the entry thereof, and shall be a lien on his (the defendant's) real estate, until reversed upon appeal, or otherwise satisfied according to law, is peculiarly applicable. No mischief can result from giving full effect to this provision in cases like this. The defendant whose estate is bound, cannot complain, for he may either bring his action of account render, or, under the equitable powers now vested in our courts, proceed in equity, and if he be really not indebted, soon free himself of the encumbrance. In the mean while, the court in which the judgment is, having full power over their own process, upon proper application, will see that it is not used for the purposes of injustice. This was the course pursued in *Tassey* v. *Church*, and the decision amounts to nothing more than that, upon a proper representation, the court will restrain the plaintiffs from having execution of their judgment against one of the debtor firm until it be ascertained they are equitably entitled to it.

On the other hand, to hold that the judgment was null as a lien against the separate estate of the defendants, or either of them, would, as it seems to me, frequently do injustice to the plaintiff partners, by depriving them of a security which the law, ordinarily, offers to the diligent creditor.

If we are right in the opinion that the judgment recovered by Swayne and Pennock, was a lien on the lands of George W. Pennock, at the time of the sheriff's sale, it seems to me the law casts upon him and those who claim to stand in his shoes, a duty in respect to it. *Primâ facie*, and in the absence of notice of facts not appearing on the record,

the avails of the sale were applicable to its discharge, in its order. If the money had been paid into court, that tribunal, having all the parties before them, and hearing no objection or suggestion of difficulty, from any one, might rightly have directed the amount of this judgment to be paid to the plaintiffs. Under such circumstances, I take it, the silence of the defendant and all others interested, might and would have been accepted as a confession that this amount was justly due to the plaintiff firm, from the owner of the land sold. The course pursued in *Tassey* v. *Church* shows this. There, after the district court, on its equity side, had entertained Tassey's bill, praying an account, the plaintiff issued an execution on the law side of the court, but this execution was not interfered with until Tassey came in and filed a suggestion that Church, one of the plaintiffs, was the same Church named defendant. Whereupon, on motion, the court set the execution aside, for the reason they had before given, that, until a settlement of the accounts, there could be no recourse to the separate property of the partner. In the absence of any intimation or motion upon the part of the defendant or his creditors, it would be no part of the duty of the court to order the parties to bring an action of account render, to direct them to go into chancery, or to award an issue to try the state of the accounts between them.

On the whole case, as presented by the special verdict, I am of the opinion the plaintiffs are not entitled to recover, and therefore direct judgment to be entered for the defendant.

Lewis and *Meredith*, for the plaintiff in error.
Pennepacker and *T. Sergeant*, for defendant in error.

Per Curiam.—Judgment affirmed.

Feehan's Case.

[December 20, 1848.]

One who is in prison for non-payment of a fine, is not entitled to be discharged on filing an insolvent bond, under the act of 11th April, 1848, until he has been in actual confinement for three months.

This was an application by Daniel Feehan, (who was confined in the Philadelphia county prison, for non-payment of a fine, to which he had been sentenced by the court of quarter sessions,) for a mandamus to the judges of the court of common pleas, and the prothonotary of the said court, commanding them to permit the said Daniel Feehan to file an insolvent bond, under the act of 11th of April, 1848.

The opinion of the court was delivered by

Bell, J.—Under the act of 11th April, 1848, relating to insolvents, an applicant who is in prison, under a sentence to pay a fine, is not entitled to a discharge until he has been in prison for the term mentioned in prior laws, viz.: for the period of three months. The evil to be remedied was a detention pending the petition, after the applicant had been confined three months.

Motion refused.*

* This case was not included in the reports in consequence of the opinion of Mr. Justice Bell having been mislaid. The foregoing is a memorandum of the point decided.

Cooke *v.* Neilson.

[JANUARY, 1849.]

A tenant from quarter to quarter, who has held over, is not bound to give notice of his intention to quit at the end of the current quarter.

ERROR to the District Court of Philadelphia.

Case stated. Action for use and occupation. On the 31st of August, 1842, R. P. Neilson, the defendant, rented of D. Cooke, the plaintiff, the house then occupied by him, "*by the quarter, commencing on the 10th of September*, 1842, *at* $200 *per quarter*." On the 24th of September, 1844, the plaintiff notified the defendant, that after the 10th of December following, his rent would be $250 per quarter: on the 6th of June, 1845, the defendant quitted possession of the premises and paid the rent falling due on the 10th June. This action was brought to recover the succeeding quarter's rent, viz.: from June 10th to September 10th, 1845.

The district court, (SHARSWOOD, President, dissenting,) gave judgment for the defendant. The plaintiff thereupon sued out a writ of error from the supreme court, and the arguments of counsel will be found, with the report of the case, in 10 Barr, 41. The supreme court being equally divided, the judgment of the district court was affirmed.

The question, therefore, cannot be considered as definitely settled in this state; the supreme court being divided, and the learned president of the district court having dissented from the opinion of the majority of the judges. The dissenting opinion of the president of the court below which contains much valuable learning, is as follows.

SHARSWOOD, President.—The question presented upon this case stated is, whether a tenant from year to year in the absence of a special agreement, can remove at the ex-

piration of any of the current years of his tenancy, without previous notice of his intention to his landlord; and whether by his failure to give such notice, he does not become responsible for the rent of the succeeding year; in other words does not continue in the eye of the law to be the tenant?

The case before us is of a tenancy from quarter to quarter. "I have rented of David Cooke the house I now occupy by the quarter." These are the words of the contract. This phrase, *by the quarter*, expresses, not a term certain, as one quarter, but the measure of the tenancy: and the tenant is a tenant for so many quarters as he continues to occupy, including the current quarter.

It is clearly established that in a tenancy from year to year, (and the same rule is of course applicable to the tenancy in this case, *mutatis mutandis*,) the landlord, in order to determine the tenancy, must give notice of his intention ending with the current year, or otherwise the tenant cannot be ejected, but becomes entitled to hold for another year.

The general custom of the tenants of farms in the country, to quit at a particular season of the year, has laid a strong foundation, in convenience, for this rule: and no difference between urban and rural property in this respect has ever been recognised.

Upon any other principle, the tenant of a farm ejected by the landlord, without notice, on or after the 1st of April, by an ejectment or the summary process provided by our act of assembly, would be destitute of a home and the means of livelihood, until the ensuing 1st of April.

On the other hand the landlord, whose farm is deserted by the tenant on the 1st of April without notice, is left without a tenant, and his property is unoccupied and unproductive until the regular time of letting again comes round.

There is, in either case, a public as well as a private loss, against which it is the policy of the law to provide.

There is not perhaps to be found in the books, any case in which this precise point has been raised and determined against the tenant, even in England. Yet there the law appears to be considered as perfectly well settled. It is asserted in the English elementary treatises of the best authority as unquestionable; 2 Bl. Com. 145; Comyn on Landl. 265, 474; Woodfall, 145. It is assumed and taken for granted in most of the cases in which the question arose and was decided, as against the landlord; *Doe dem. Dagget* v. *Snowden*, 2 W. Bl. 1224; *Gulliver dem. Tasker* v. *Burr*, 1 W. Bl. 526; *Right* v. *Darby*, 1 T. R. 162; *Sparrow* v. *Hawkes*, 2 Esp. 504; *Kingsbury* v. *Collins*, 4 Bingh. 202; *Izon* v. *Gorton*, 5 Bingh. N. C. 501. In *Savage* v. *Dupins*, 3 Taunt. 410, the defendant agreed by parol to rent a house as tenant from year to year for the residue of a term, which was three years and three quarters. He held for three years and one quarter, and then removed. It was ruled, that though perhaps he might have quitted without notice at the end of three years, yet remaining longer, implied a contract to pay rent for the residue of the term. The reason, as sufficiently appears in the report of the case, why he might have left at the end of three years without notice, was that the original lease, out of which the tenancy from year to year was derived, not having another integral year to run, ceased to furnish materials for the longer duration of the tenancy from year to year. We may well therefore apply to this case the maxim, *exceptio probat regulam*. In *Wilson* v. *Abbott*, 3 B. & C. 88, the question which arose was, whether the taking was for one year certain or from year to year, and the only reason why that point was at all material in the case, was that the tenant had failed to give notice. A. let apartments in his dwelling house to B. at a rent payable half-yearly. B. took possession at Michaelmas, 1822, and at Lady-day, 1823, paid half a year's rent. In June of that year, B. left the apartments without giving any notice to quit, but at

Michaelmas, 1823, which was the expiration of the first year of his tenancy, he paid half a year's rent. At Lady-day, 1824, the landlord demanded another half year's rent, which the tenant refused to pay, and the court of king's bench held that the tenant was not liable, distinctly upon the ground that in the case of lodgings, which are not usually let for so long a period even as a year, they could not infer from the facts a contract from year to year. It is plain, therefore, that unless it had been considered a conceded point, that if B. was a tenant from year to year, he was bound to give notice, no question at all would have arisen in the case.

This doctrine is most consonant with the other incidents which have been attributed to tenancies from year to year, and with the history and character of this kind of interest. It arose from the old tenancy at will. The inconveniences resulting from a sudden determination of the will by either lessor or lessee, induced the courts to convert all lettings for an indefinite duration, when an annual rent or other return at a certain period was agreed on, into tenancies from year to year, and to require a reasonable notice by either party to the other before the estate could be determined. It was perhaps judicial legislation; and though its date be, as is supposed, 13 Hen. VIII., it is now as much and as inseparably a part of the common law as any doctrine, let it have sprung ever so near its yet undiscovered fountain head. Thus, some degree of certainty in the possession—not only the matter of repose, but the sure incentive to the industry and enterprise of the possessor, and the consequent increase of the public wealth and strength—was imparted to an interest which was before vague and uncertain. Accordingly it has always been held that in pleading this estate, it may be averred to be a term for so many years as the lessee has occupied, including the current year, and it was assured to continue to the end of that year, and still longer unless either party before the expiration of the cur-

rent year, gave notice of his intention to determine the estate; 4 Bacon's Abr. 180 n.; *Legg* v. *Strudwick*, 2 Salk. 414; *Birch* v. *Wright*, 1 T. R. 380; *Webber* v. *Shearman*, 6 Hill, 20; 8 S. & R. 468. Still, however, it is in legal phrase a tenancy from year to year, *quamdiu ambabus partibus placuerit;* and, as it was held at a very early period, it partakes of the nature of the old tenancy at will in this very important particular, that it is of the essence of the estate that it shall be at the will of both the lessor and the lessee; so that if parties should expressly contract for an estate to be held at the will of one of them only, the law will not recognise such an interest, but at once annexes to the estate created by the contract, that mutuality, which, like the power of alienation in an estate in fee, is its inseparable incident; Keilw. 65, pl. 6; ib. 162, pl. 4; 13 Hen. VIII. 16, pl. 1. This principle of mutuality ran through the whole law of tenancies at will in a very remarkable manner. Thus, if the lessor determined his will in the middle of a quarter, he lost the whole rent of that quarter. If the lessee in like manner determined the estate in the middle of the quarter, he was liable for the rent of the whole quarter; *Layton* v. *Feild*, 3 Salk. 222, pl. 1; S. C., 1 Ld. Raym. 707. If the lessor determined the will, the lessee was entitled to the emblements, with free entry, egress and regress, to cut and carry them away: *aliter*, if it was determined by the act of the lessee; Litt. § 68; Co. Litt. 55 b.; *Stomfil* v. *Hicks*, Holt, 414. The landlord could only determine the estate by some notorious act upon the ground, or by notice to the tenant. In like manner it was expressly held, that the tenant could not determine his will secretly without notice given to the lessor; 2 Bl. Com. 145; Co. Litt. 55 b.; 1 Roll. Abr. 861; *Highly* v. *Bulkly*, 1 Sid. 339; T. Jones, 5. It is unnecessary to pursue these analogies further.

The case of *Hemphill* v. *Flynn*, 2 Barr, 144, does not in the least touch this principle of mutuality. That was not

a case of tenancy from year to year, but for a year certain. The tenant held over, and claimed upon payment of the rent of the first quarter of the second year, that he had a right to give up the possession, and be released. It was decided that the landlord might either elect to treat him as a wrong-doer or as a tenant for another year, upon the terms of the original letting, while the tenant had not the same right of election; in other words, could not elect to consider himself as a trespasser—could not take advantage of his own wrong.

It is supposed, however, that there is a custom contrary to this in Pennsylvania, of which the court can and is bound to take notice, as part of the common law of the state. The impression of the bar, when it has become the ground of a well settled course of counsel and practice, is no doubt entitled to the most profound respect. It is rarely, if ever wrong. But it should be of the most clear and unequivocal character, to establish a general custom, differing from the common law. Can the impression referred to be considered of this character, when we find Judge DUNCAN, than whom no man had a larger practice at the bar nor longer experience in the interior counties, saying, of the provision in regard to notice:—"It prevents a surly landlord from dispossessing his tenant at an unreasonable time of the year, and a perverse and crooked tenant from quitting when the landlord cannot procure another tenant;" (*Logan* v. *Herron*, 8 S. & R. 472;) and Judge KENNEDY, who was as distinguished for his accuracy as for his extensive learning, and who would not have failed to qualify his language if he had entertained a doubt, expressing himself as follows:—"My idea of a lease from year to year is this, that it is binding prospectively on the parties for one year only, capable however of being extended to a second, third, fourth or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months' previous notice to that effect." *Lesley* v. *Randolph*, 4 Rawle, 127.

On the whole, I am of opinion that judgment on this case stated, should be entered for the plaintiff, but as the majority of the court entertain a different opinion, judgment must be entered for the defendant.

Commonwealth *v.* Duffield.

[May, 1849.]

A resident of the state of Maryland by his will, proved there, directed his executors to set apart the sum of $20,000, the interest of which he directed to be paid annually to his sister, a resident of Pennsylvania, during her life, and gave to her a power of appointment over $10,000 of that sum, by her will or otherwise at her death: *held*, that the appointee took by virtue of the will of the first testator and was not subject to the charge of a collateral inheritance tax under the laws of Pennsylvania.

That a legacy passing by will under a general power of appointment is equitable assets for the payment of debts of the donee of the power, *dubitatur*.

Error to the Common Pleas of Cumberland county.

The Commonwealth of Pennsylvania against Henry Duffield and Sarah his wife, which said Sarah is the executrix of Margaret M'Donald, deceased.

The following facts were agreed upon and considered in the nature of a special verdict:

Margaret M'Donald, of Carlisle, died in May, 1844, having first made her last will and testament, and appointed Mrs. Sarah Duffield the executrix of the same, which will was duly proved before the register of Cumberland county, on the 1st of June, 1844, and letters testamentary issued in due form on the same, to the said Sarah Duffield, one of the defendants in this action. At the death of the said Margaret M'Donald, she left real estate valued at $3,000 —personal estate in inventory valued at $610 50—a note of the trustees of the presbyterian church of Carlisle, of

$100, not in inventory—and sundry notes of her niece, Margaret M'Donald, of the city of Baltimore, amounting to the sum of $1,000. That the foregoing property, which has been willed to collateral heirs, is liable to a collateral inheritance tax, there is no dispute—and a greater part of it has already been paid to the register of this county, and the tax will be paid on any balance of said estate that remains after paying debts and expenses of administration without controversy.

By the 5th clause of the will of said Margaret M'Donald, she gives the rest and residue of her personal property to Mrs. Duffield, and executes the power conferred by her brother's will as follows: "And whereas my brother, the late Alexander M'Donald, by his last will and testament, admitted to probate in the city of Baltimore, and bearing date the 23d July, A. D. 1836, did place at my disposal the sum of $10,000, by the following clause therein, to wit: 'I authorize and empower my said sister to give, bequeath and dispose of $10,000, (to take effect at her decease,) either by her last will and testament, or by any declaration of hers in writing,' &c. Now it is my will and desire, and I give and bequeath the same to my niece, Sarah Duffield, and I do hereby direct the executors of my late brother to pay the same to her."

The said Alexander M'Donald was at his death a citizen of Baltimore, and his estate was there, and so continued at the death of Margaret M'Donald. His will was proved in Baltimore, and was dated as aforesaid, on the 23d of July, 1836. The clause in said will referred to in the will of Miss M'Donald, is as follows: "I will and direct that my executors and trustees, hereinafter named, set apart the sum of twenty thousand dollars out of my estate, and that they pay the interest and income thereof annually, or oftener, to my sister Margaret M'Donald, during the term of her natural life, for her comfortable maintenance and support; and I authorize and empower my said sister to

give, bequeath and dispose of one half of the said principal sum itself, to wit, ten thousand dollars, (to take effect at her decease,) either by her last will and testament, or by any declaration of hers in writing, to be signed in the presence of, and attested by two credible witnesses; and after the decease of my said sister, the other half of said principal sum to revert to my general estate; or if no disposition of the said sum of ten thousand dollars shall have been so as aforesaid made by her, then the whole shall so revert."

Since the death of Miss M'Donald, the executors of Alexander M'Donald, in Baltimore, have paid the $10,000 aforesaid to Mrs. Duffield.

The question for the court is, whether this $10,000, under the facts and circumstances is chargeable with a collateral inheritance tax?

WATTS, President, delivered the following opinion, which was the subject of the error assigned.

"Alexander M'Donald, a resident of the state of Maryland, by his will, directed his executors to set apart the sum of twenty thousand dollars of his estate, of which they should pay the interest annually to his sister Margaret M'Donald, resident in Pennsylvania, during her life for her maintenance and support, and by his said will authorized his said sister to dispose of one half of that sum, (ten thousand dollars,) to take effect at her decease, either by her will or any other declaration in writing. Margaret M'Donald subsequently died, having first made her will, by which, after reciting the will of her brother, Alexander M'Donald, she provides—'Now it is my will and desire, and I give and bequeath the same to my niece Sarah Duffield, and I do hereby direct the executors of my late brother to pay the same to her.'

"The executors of Alexander M'Donald, resident in Maryland, did pay the said ten thousand dollars to Sarah Duffield.

"Is this sum of ten thousand dollars chargeable with a

collateral inheritance tax, under the laws of Pennsylvania? May it be recovered in this action?

"Whether an action will lie to recover a collateral inheritance tax, payable to the commonwealth, under any circumstances, is a question which is neither raised by the case nor argued by the counsel. I will assume, therefore, that the object is to settle the question of right without regard to form.

"It is clearly settled upon authority not to be questioned, that a general power of disposition, not restrained as to the objects or the mode, is, in effect, property. Sugd. on Pow. 386; Powell on Pow. 368; 2 Ves. Sen. 9; 12 Ves. Jr. 192. It is therefore argued, that the execution of the power in this case, by Margaret M'Donald, made the bequest of $10,000 absolutely her own: that her domicil being in Pennsylvania, drew the possession of it to her, and that it is therefore subject to the collateral inheritance tax.

"In the *Com.* v. *Smith*, 5 Barr, 142, a construction is given to our statute which subjects the estates of certain persons to a collateral inheritance tax, the leading feature of which is that it is not the person, but "the estate within this commonwealth on which the tax is levied:" and his honour who delivers the opinion of the court, adds, "the domicil has nothing to do with the question." Unless the fund sought to be taxed was legally in Pennsylvania, by reason of the domicil of Margaret M'Donald, who had the *jus disponendi* of it, it cannot be considered as ever having been within the state, or subject to our laws. Alexander M'Donald's executors in Maryland were directed to fund it, and to pay the interest to his sister during her life, and to pay the principal to her appointee at her death; the will of Margaret M'Donald directs her brother's executors to pay it to Mrs. Duffield, and the special verdict finds that they did pay it to her.

"All our acts of assembly provide for the mode of collecting this tax, by charging the executors with it. By the

original act of the 7th of April, 1826, "no executor or administrator shall be discharged until the tax is paid." By the act of 24th February, 1834, an executor paying a legacy, shall retain 2½ per cent. If the bequest be specific, he shall not deliver it until the legatee pays to him 2½ per cent. on its appraised value. And by the act of 22d March, 1841, power is given to the register to issue a citation to the executor to compel him to pay the tax, which, if he neglect or refuse, the court are directed to enforce; so that all our laws look to the executor or administrator as the person liable to pay, and not to the legatee, against whom no action would lie, nor does the law give any remedy against him whatever. It is an unanswerable argument, that there is no remedy against a legatee, and therefore no right. If the executrix, therefore, of Margaret M'Donald, was alone responsible for this tax, she could only be liable on the ground of her having the means of payment; this she could only have by means of her having a right to recover the legacy itself, for the benefit of the legatee who was the appointee, or creditors, as the case might be. Now, was this legacy under the will of Alexander M'Donald, recoverable by the executrix of Margaret M'Donald as executrix; for it cannot alter the case, that the executrix and appointee happened to be the same person? The fund was in Maryland, in the hands of Alexander M'Donald's executor, and whosoever would recover it, must recover it there, under the laws of Maryland. It required no aid of the laws of Pennsylvania or of her courts, to enable a personal representative of Margaret M'Donald to recover the money, nor was the fund ever under the protection of Pennsylvania law. But we are of opinion that Mrs. Duffield, the appointee, was a legatee directly under the will of Alexander M'Donald, and that the legacy of $10,000 was rightly paid directly to her, as appointee, by the executors of Alexander M'Donald, and this proposition is clearly settled by our own court, in the case of *Hess* v.

Hess, 5 Watts, 187, where the court decided that the right of action to recover a legacy under like circumstances is in the appointee directly against the executors of the first testator. We are for these reasons of opinion, that the plaintiff is not entitled to recover, and that judgment be entered for the defendant."

The cause was argued in the supreme court by *W. H. Miller* and *Samuel Hepburn*, for plaintiff in error; and by *Wm. M. Biddle*, for defendant in error.

The opinion of the court was delivered by

GIBSON, C. J.—The enjoyment of this legacy by the first taker of it, was expressly limited to her life time; and she consequently took a particular interest in it, joined to a power of appointment at her death. Had the testator been an inhabitant of Pennsylvania, it would have been taxable as her property in her life time, and payment of the tax would not have been deferred till her death. He was, however, an inhabitant of Maryland, and the statute imposes no tax on a foreign legacy brought here when received. But money appointed by will under a general power to appoint for any purpose, is held by English chancellors to be equitable assets for payment of the debts of the donee of the power; whence an impression that it is part of the donee's effects, and in this instance, taxable as such. Truly speaking, it is not. It is certainly not legal assets, as it would, had it been the donee's property; for it does not go into the hands of the executor in a course of administration. It is confessedly not a part of the donee's estate for the satisfaction of his creditors while he is living, and it cannot be more so when he is dead; for a title which did not vest in him when he had capacity to take, could not vest in him when he had lost all capacity whatever. Yet a chancellor intercepts the fund on its way to the appointee, and applies it to the debts of the donee of the power, not as what is actually a part of his effects, but as what, according to his

code of morality, ought to have been so for the benefit of his creditors. As was said, in *Harrington* v. *Hale*, 1 Cox, 132, he stops the legacy in *transitu* when a step has been taken to appoint it to the use of any one else; and this, a liberty taken with the direction given to the testator's bounty pursuant to his authority, and with what is essentially his act performed by the agency of another, is strangely put upon the moral obligation which binds the agent to pay his debts; the assumed violation of which, in not paying them with the money of another—in not robbing Peter to pay Paul—is held to give his creditors a specific equity against a volunteer under his appointment. "It may be a hard case," said Lord HARDWICKE, in *Townsend* v. *Windham*, 2 Ves. 8, "but I must not make a precedent that men may make a provision in prejudice of their creditors." Of what prejudice or wrong would his creditors have reason to complain? There is such barefaced injustice in applying the bounty of a man to the benefit of those for whom it was not intended, that the mind revolts at it. The appointee claims by the instrument which created the power, (Sugd. on Pow. 25,) and consequently not under, but paramount to the donee who executed it; and it seems impossible to conceive that the donee's creditors who stand in his place, can have an equity independent of him. A man who is appointed to manage the conduit pipe of another's munificence, is authorized by a general power of disposal to turn it at will to any quarter within the scope of his discretion; and in reason and justice his creditors have no right to control, because the management of it was not to them, nor even to him for their benefit. It is the bounty of the donor to whom they are strangers, and not the property of his instrument that is to be dispensed. A power instead of the ownership is usually given for the very purpose of enabling him to pass them by; and to give them what was intended for objects that were more in the donor's view, would be a fraud on him. He might exclude

them by an express restriction, and he does so in effect when he gives a legacy not to them nor their debtor, but to persons to be designated by him. In *Holmes* v. *Coghill*, 7 Ves. 506, Sir William Grant said "there is no reason why the money he (the donee) had a right to raise, should not be considered his property as much as a debt he had power to recover." The learned and excellent master of the rolls had forgotten, for the moment, the broad line of distinction between power and property. The creditors of a deceased husband are not entitled to the benefit of his surviving wife's choses in action, though he might have recovered it, and if it accrued during the coverture, by an action in his own name; and assignees in bankruptcy are authorized to execute a power in the bankrupt for the benefit of creditors only by the 3 G. IV. c. 31, § 53, subsequently made perpetual. There is much more reason in what Lord ELDON said, in *Holmes* v. *Coghill*, 12 Ves. 212, when it came before him on appeal. "It is much to be regretted that the right of creditors to receive satisfaction out of the estate of their debtor, should depend upon either artificial modes of conveyancing or artificial rules of law clashing with each other, and not to be reconciled to clear principles of law or equity. I confess I am not able to reconcile what a court of equity has been in the constant habit of doing and what it has refused to do." Again,—"A court of equity, certainly in favour of creditors, takes upon itself to disregard altogether the quality of the deed; to alter wholly the rights of the parties under it. Sir John Coghill, though bound to pay his creditors, would not be called by law to pay them out of an estate which is the property of another person. Yet equity does so strong an act as to pay them out of the estate which was vested not in him, but in his son." Whether for good or for evil, it is certainly a strong act. Yet on the foot of their shallow equity, bred by the commercial temper of the bankrupt law, and founded on too many precedents to be shaken, an English chancellor puts

his hand into the fund and serves it out to them till all are satisfied, or till nothing remains. Whether this court will feel itself bound to do so remains to be determined.

I have been thus particular in examining the foundation of this doctrine of equitable assets, because the analogy to be drawn from it is the only foot which the commonwealth has to stand on; but its palpable injustice, in any event, must forbid the extension of it to cases merely analogous. But what is the supposed equity of the state as a tax proprietor? It may be said to be as much a moral duty to pay taxes as debts. Why so it is. But it is not either a legal or moral duty of the legatee, who transmits the remainder, to pay the tax on it. That is to be done, if at all, by the collateral recipient of it; and the analogy from a case between debtor and creditor consequently fails. Being pretermitted in the execution of the power, the state has not a legal title; and there can be no equitable title to a tax which is a creature of positive enactment. Her claim as a legal creditor would be a *petitio principii;* for she would be without pretence to call for a tax which could not be assessed on the legacy as the property of the donee of the power in his life time, or at his death—not in her life time, because she received the legacy in Maryland; and not at her death, because it was transmitted, not by her appointment, but by the testator's will, of which her appointment became a part. She was free from obligation to execute the power for the benefit of the state, which was not her creditor when she was alive, and could not become so when she was dead. To sustain the action, therefore, against the defendants as representatives of her person or estate, is impossible.

But Mrs. Duffield is not only a personal representative of the donee, but her appointee; and it is necessary to determine whether the state has a claim on her as a legatee. She got her legacy by an appointment under the will of a citizen of Maryland; and she stands before us as if she

were named in it. The act of 1826, on which the claim is founded, provides that "all estates passing from any person who may be seized or possessed thereof, being within this commonwealth," shall be subject to a collateral inheritance tax; and the matter is to fix the point of time to which the material clause relates. In *Commonwealth* v. *Smith*, 5 Barr, 142, the assets were here at the time of the death, and that is undoubtedly the period which the legislature had in view; for though it be certain that an estate created under a power takes effect as if created by the deed or will which raised the power, it does so only from the execution of the power; yet the distinction is not so obvious as to have suggested to the legislature the occurrence of such a case as the present. In this instance the assets were in Maryland at the testator's death; the legacy was enjoyed here by the first taker; and no more is required by the second than that she should be at liberty to enjoy the residue of it without disturbance as her predecessor. In point of fact, the *corpus* was not here at all. The testator directed it to be set apart in Maryland for the use of his sister in Pennsylvania during her life, and for her appointee at her death. Personal property has no locality as to the succession, though the rights of creditors who owe no allegiance to the country of the domicil, are determinable by the *lex loci rei sitæ;* but, in this case, the actual as well as the domiciliary *situs* was in Maryland where the ownership vested in the appointee. We have then the ordinary case of a legacy given and received in a foreign state; and it is not taxable here.

Judgment affirmed.*

* Where a testator devised his estate in trust for his daughter, for life, and after her decease, in trust for such persons as she should by will appoint; and the daughter by her will devised all her estate to which she was entitled, under the will of her father, in trust for her brothers and sisters, or their children, lineal descendants of the original testator; it was held, that though such brothers and sisters, and their children, were collateral heirs of the

Robarts' Appeal.

[JANUARY 20, 1851.]

A guardian cannot raise an account merely to get commissions on a fund which does not pass through his hands; and is not entitled to an allowance for expenses incurred in pursuance of such unfounded claim to commissions.

APPEAL from the Orphans' Court of Philadelphia.

Robert Bell, on the 15th of March, 1838, gave a bond to William Stephens, as guardian of the estates of Hannah Bell and William Bell, minors, to secure the sum of $8000, payable "on the arrival at full age of the said Hannah Bell and William Bell," with interest half-yearly. William Stephens was discharged as guardian, and the Girard Life Insurance, Annuity and Trust company were appointed in his place, to whom he assigned the bond. Hannah Bell intermarried with Thomas B. Russum, and by marriage articles, the company was made trustee of her estate. The company entered up judgment on the bond. About three months prior to the maturity of the bond, Mr. and Mrs. Russum wishing to procure a loan on the security of her separate estate, it was agreed that W. S. Robarts, the appellant, should be appointed her trustee in place of the company, and also guardian of William Bell, which was accordingly done. On the 13th of August, 1843, William Bell having attained his full age, the bond became due, and by direction of W. Bell and Mr. Robarts, the company handed over the bond and papers to counsel for collection,

daughter, they took under the will of the father, by virtue of the power of appointment; and that the estate was not liable to the collateral inheritance tax. *Com.* v. *Williams*, 1 Harris, 29. Where a testatrix, reciting that A. was indebted to her on bond, declared that in case he made no demand against her estate for boarding or services rendered her, she bequeath him the debt due by him, and directed her executors to cancel the bond: this legacy is subject to the tax on collateral inheritances. *Tyson's Appeal*, 10 Barr, 220.

and the judgment was marked of record to the use of William Bell and W. S. Robarts, trustee of Hannah Russum, "to be held in equal moieties by the said William Bell and Walter S. Robarts, trustee." The defendant paid over the amount of the bond to the counsel, and Mr. Robarts having interposed a claim for commissions, it was agreed that the counsel should retain a sufficient amount in his hands for the payment of the commissions claimed, if the orphans' court should determine that the guardian was entitled to them. The guardian filed an account, to which exceptions were filed; and an auditor was appointed, at the instance of William Bell's counsel, who reported an account, to which exceptions were filed, excepting to the allowance of the accountant's commissions, the fees paid by him to counsel, and the costs of the audit. The orphans' court sustained the exceptions, which was here assigned for error.

Randall, argued for the appellant.
T. S. Smith, for the appellee.

Per Curiam.—The appellant could not legitimately raise an account merely to get commissions on a fund which had not passed through his hands. That his ward had agreed that he should have so much as an inducement to accept the guardianship cannot strengthen his claim, in point of legal obligation, whatever it might do in point of honour. The expenses claimed were incurred in pursuit of the appellant's private and unfounded demand; and though it is proper that they be paid, it is not proper they be paid out of any pocket but his own. He was entitled to something for his responsibility, and he has had an allowance for it, which we are not disposed to increase.

Decree affirmed.

Ashton *v.* Clapier.

[JANUARY 20, 1851.]

In replevin for rent, set-off is not allowable, except under the act of assembly, which applies only to cases under one hundred dollars.

ERROR to the District Court of Philadelphia.

Action on the case for an excessive distress. The amount of rent distrained for was $195, being a balance of one year's rent, due April 1st, 1841. The tenant offered to set off a claim of $220, against the rent due; Mrs. Clapier, however, refused to allow it out of the current year's rent. On the trial before STROUD, J., the defendant's counsel requested the court to charge the jury that the plaintiff was not entitled to extinguish the claim for rent due by a set-off, unless it was proved that the defendant agreed to it. The court said,—"this is the law; mutual accounts are not payments, and unless the defendant agreed to allow this bill, it was not an extinguishment of the rent: therefore, if the defendant refused to allow this bill, the distress was legal." This charge was here assigned for error.

F. E. Brewster, for plaintiff in error.
Emlen, contra.

ROGERS, J.—In replevin for rent, set-off is not allowable, except under the act of assembly, which applies only to cases under one hundred dollars. The act leaves the law of set-off, above that amount, as before. The only question, then, is, is the mutual account, under the circumstances of this case, a payment or satisfaction of the rent? And this, as the court truly say, has been repeatedly decided in the negative. The acknowledgment, that the set-off was just, is nothing, unless she expressly agreed to allow the set-off, and this, it is conceded, she refused to do.

Judgment affirmed.

Lennig *v.* Tobey.

[JANUARY 27, 1851.]

Notice of protest for non-payment of a promissory note, *personally* delivered, on the proper day, is not vitiated by being post-dated; the mistake being one which could not have misled the endorser.

ERROR to the District Court of Philadelphia.

The facts of the case fully appear in the opinion of the court below, which was delivered on the 23d of September, 1848, by

STROUD, J.—This was an action of assumpsit on a promissory note for $727,08, dated January 22, 1846, made by Thomas Mercer, Son & Co., payable four months after date, to the order of the defendants, by whom it was endorsed, and delivered to the plaintiff. The parties resided in this city, and the note was made here. One of the pleas was, that the defendants had not due notice of the non-payment of the note.

On the trial, the plaintiff having read the promissory note, called Francis J. Troubat, Esq., notary public, who testified as follows: "On the 25th of May, 1846, at the request of the Mechanics' Bank, I presented this note to the makers, at their counting house on the wharf, and demanded payment. They declined payment, saying it was an affair of the endorsers. I went immediately to the counting house of the endorsers, the defendants, on the wharf, about a square off. I had the notice of protest in my pocket. I handed it to one of the defendants. This is the notice. This notice was then read as follows:

"*Philadelphia, May* 26, 1846.

"Payment of Thomas Mercer, Son & Co.'s note, in favour of yourselves, and by you endorsed, for $727,08, and delivered to me for protest, by the Mechanic's Bank

of the city and county of Philadelphia, the holders, being this day due, demanded and refused, it has been by me duly protested accordingly, and you will be looked to for payment, of which you hereby have notice."

The notice was addressed to the defendants. The witness continued: "I made a mistake in the date of this notice. It should have been dated the 25th of May, instead of the 26th."

The counsel of the defendants contended, that this evidence was insufficient to charge the defendants as endorsers of the note, and cited *Etting* v. *Schuylkill Bank*, 2 Barr, 355. The judge, reserving the point, told the jury the evidence, if believed, was sufficient. The verdict was for the plaintiff. The only question is, was this direction right?

Mistakes, not only of time but of other circumstances, in notices to parties, are of frequent occurrence, and have again and again been the subjects of judicial determination. And the test which has been generally applied has been whether or not the mistake has misled. In some instances the court has decided directly, and in others, referred the question to the jury.

In *Eldon* v. *Haig*, 1 Chitty's Reports, 11, notice of executing a writ of inquiry, "on Wednesday, the 11th of June, instant," when Wednesday fell on the 10th of June, on which day the writ of inquiry was executed, was held sufficient, and the court refused to set aside the execution of the writ of inquiry, the defendant not swearing that he was misled thereby. A similar decision had been previously made in *Batten* v. *Harrison*, 3 Bos. & Pul. 1.

Again, on the very subject of notice to endorsers of the non-payment of notes by the makers, the same principle has been applied through the instrumentality of the jury. Thus, in *Smith* v. *Whiting*, 12 Mass. R. 8, where, in the notice the name of the maker of the note was erroneously given, and the note was stated to have become due before the days of grace had expired, it was left to the jury to

say, whether the endorser had thereby been misled. The jury found that he had not, and the court in banc sanctioned the ruling on the trial. *Reedy* v. *Seixas*, 2 Johns. Cas. 337, furnishes a similar example. And in *Ontario Bank* v. *Petrie*, 3 Wend. 456, it was held, that where in a notice of non-payment dated on the day that a draft fell due, it was stated that the draft had been protested on the evening before for non-payment, and that the holders would look to the endorsers for payment, it was proper to submit the question to the jury, whether or not the endorsers had been misled. But the authority of this case has been since overthrown by a decision of the same court, in *Ransom* v. *Mack*, 2 Hill, 588. There a note became due on the 3d of July, and payment of the maker was then demanded, but the notice stated that it had been demanded on the 4th, and then refused. The circuit judge, relying on *Ontario Bank* v. *Petrie*, submitted to the jury the question whether the endorser had or had not been misled by the notice. The supreme court reversed the judgment in consequence of this ruling, on the ground that the facts having been ascertained, it was the duty of the court to declare the law, and that, in judgment of law, no notice had been given to the endorser.

The principle of *Ransom* v. *Mack*, has been acted upon by the supreme court of this state, in *Etting* v. *The Schuylkill Bank*, 2 Barr, 355. The mistake in the notice in this case was in dating it one day too early—on the second day of grace—and informing the endorser that payment had been demanded on that day. In point of fact, the demand had been at the proper time, and was so stated in the protest, which was given in evidence without objection. Here, the court below acted in accordance with *Smith* v. *Whiting*, *Reedy* v. *Seixas* and *Ontario Bank* v. *Petric*, already particularly noticed, and submitted the question of mistake to the jury. The judgment was reversed.

The reversal was put on two grounds. 1. That as the

protest was the act of a foreign notary, "it was evidence of the fact of protest, but of nothing else." There was, therefore, no evidence whatever of demand, and refusal to pay, and so the jury ought to have been directed. This glaring defect in the evidence of the plaintiff, owing most probably to the absence of the retained counsel of the defendant, and the introduction of other counsel on the spur of the moment, was overlooked at the trial.

2. The other ground—the submission to the jury to determine as to the supposed conflict of evidence, or, as it was viewed in the supreme court, the effect of the mistake of day in the written notice of non-payment, was fully considered in that court, and the cogent reasoning of the chief justice by whom the opinion was delivered, led to a result equally fatal to the judgment below.

On the argument on the rule for a new trial in the present case, the defendant's counsel relied upon the authority of the two decisions last referred to. And if they were directly in point, as he seemed to think, he would be entitled, most certainly, to our judgment. As to the case of *Ransom* v. *Mack*, it comes to us as the unanimous opinion of the judges of the supreme court of New York, sustained if not founded upon a then recent decision of the court of errors, the highest judicial tribunal in that state. And in respect to *Etting* v. *The Schuylkill Bank*, it is our plain duty in this, as it is alike our practice and our duty, in all cases vouching the same authority, to yield implicit obedience.

The facts of those cases, however, are not analogous to the facts of the case now before us. Where the time stated in the notices had already passed, the parties addressed might naturally, if not necessarily, have been misled. While to assert that a series of transactions had taken place on a day then future, was an absurdity because an impossibility, by which no one could have been deceived.

The determination of this case, then, depends essentially

upon this difference in its facts from the facts of all the decisions already mentioned.

It is well settled mercantile law, that notice of the dishonour of a promissory note or bill of exchange, need not be given in writing. It may be communicated orally to the party to be affected by it. It may, of course, according to the will of the person charged to make it, be partly oral and partly written.

Here the plaintiff proved by the notary, that payment was demanded and refused on the 25th of May, which was the proper time, and that on the same day, immediately afterwards, he put into the hands of one of the defendants, at their counting house, a written notice of the dishonour, which was accurate in all respects but one: namely, that it was post-dated a single day. The promissory note was truly described—it was stated to have become due, been demanded, refused and thereupon duly protested. The endorsers were, moreover, warned that they would be looked to for payment.

Being parties to the note, the defendants were bound to know at what time it fell due. They knew, therefore, that that time was the 25th of May—they knew, too, that the notice was handed to them on that very day; and its contents showed plainly that it had been inadvertently post-dated by the notary.

We consider the true view of the case to be this:—The 26th of May not having yet arrived, was, when the notice was served an impossible day, and on that account should be altogether disregarded. The notice must be treated as not having a written date. The time of its delivery, which was personal to the defendants, as proved by the notary, is to be taken as its proper date, and its contents in all other respects, to be read in reference to it.

Apart from the reasonableness of such a procedure, which carries with it its own commendation, there is not wanting strong authority to sustain it. In *Doe on the de-*

mise of the Duke of Bedford v. *Knightley*, 7 T. R. 63, on the trial of an ejectment, the defendant, who was tenant to the lessor of the plaintiff, objected to the notice to quit, which was served just before Michaelmas, 1795, and was to quit "at Lady-day, which will be in the year 1795." The plaintiff was hereupon non-suited, but upon a motion to set aside the nonsuit, the court in banc made the rule absolute, Lord KENYON, C. J., saying, "the time when the notice was given, and the words in it, 'which will be,' manifestly showed that this was a notice to quit at the then next Lady-day. Then the year 1795, in the notice, may be rejected, as an impossible year."

So, where the "writ was tested on the 28th of November, in the forty-ninth year of his majesty's reign, and was returnable in eight days of St. Hilary, but the notice required the defendant to appear on the 20th day of January, 1808;" a rule was obtained to show cause why the proceedings should not be set aside.

Here the writ was tested subsequently to the day at which the party, by the notice at its foot, was required to appear, and although the statute of 5 G. II. c. 27, was express that no process should be good without an English notice at the foot to explain the writ, and it was urged that an ignorant defendant could not know from this when he was to appear; yet the court discharged the rule, observing "that as the notice was to appear at the return of the writ, which was tested subsequently to January, 1808, no man could understand it to require an appearance in January, 1808. The defendant must know, that his appearance was required at a future and not on a past day. It was, therefore, an immaterial mistake, which could do no harm, for what other day could occur to him than the 20th of January, 1809? It was quite impossible that the party should not understand that to be the year intended." *Steel* v. *Campbell*, 1 Taunt. 424.

As no reason is perceived for a difference in the law re-

gulating bills of exchange and promissory notes, or a subject of this kind, from the law of landlord and tenant, or that which concerns process of courts, the rule for a new trial should be discharged, and judgment entered for the plaintiff on the verdict.

The defendant below sued out a writ of error upon this judgment, and assigned for error the judgment of the court below upon the point reserved. The case was argued, in the supreme court, by *G. M. Wharton*, for plaintiff in error, and *E. S. Miller*, in reply; and, on the 27th of January, 1851, the Chief Justice delivered the opinion of the court, affirming the judgment.

Sibbald's Estate.

[February 19, 1851.]

In this case, the court ruled, that each party aggrieved by a decree of the court of common pleas, or orphans' court, must take a separate appeal to this court; and that upon every such appeal, the tax of three dollars and fifty cents, imposed by the act of the 6th April, 1830, is due to the commonwealth.

CASES

IN THE

COURT OF NISI PRIUS,

AT

PHILADELPHIA.

Myers *v.* Snyder.

[FEBRUARY 23, 1843.]

A master or employer is responsible for the illegal acts of commission or omission, short of wilful wrong, done or suffered by his servant or agent, in the prosecution of the business intrusted to him by his principal, whereby third persons are injured.

There is no distinction between the responsibility of an employer for the acts of an ordinary agent or servant, and of a contractor for the erection of a building; both are included within the operation of the rule.

One engaged in the prosecution of a lawful work, is bound to use such care and caution in carrying it on, as will reasonably enable others, by the practice of ordinary prudential care, to avoid personal hurt, and prevent injury to their property.

In the case of excavations, more especially in public places, it is the duty of those owning or having them in charge, so to guard and fence them, or, at least, to give such warning notice of their existence, as will be sufficient to prevent others using ordinary caution, from falling into them.

But a person injured by such means is not entitled to recover damages if the accident was the result of his own carelessness.

In such case, however, want of care on the part of the plaintiff, is not to be presumed; it must be proved, or properly inferable from the evidence in the cause.

[Myers v. Snyder.]

ACTION on the case for negligence. It appeared from the evidence that the defendant was the owner of a vacant lot, situate between two houses, on the west side of Morris street, which runs from Pine to Lombard streets, between Broad and Schuylkill Eighth streets, in the city of Philadelphia. In October, 1845, he contracted with one Elijah Jones for the erection of a house upon this lot. The contractor proceeded to dig out the cellar, which was left without any fence or guard, or any thing to indicate the presence of an excavation; and, on the morning of the 27th of October, 1845, before day-light, about three o'clock, (being a dark and foggy morning) the plaintiff, a newspaper carrier, fell into the cellar while pursuing his usual occupation, and was thereby severely injured: his thigh-bone was fractured, his spine dangerously injured, and in consequence he was confined to his bed for several months, and has become disabled for life, (by the distortion of his hip, and a curvature of the spine) from any active employment. There was no public lamp near enough to indicate the presence of an excavation.

Webster and *Barton*, for plaintiff, requested the court to charge the jury as follows:—1. That a person building a house in the city of Philadelphia, is bound to guard and protect the cellar thereof, in such a manner, as that persons walking along the footway shall not be liable to fall into it. 2. That if the defendant allowed his cellar to remain open and placed no guard or protection to prevent persons falling into it; and the plaintiff, in the dark, walked into it by mistake, plaintiff is entitled to recover. 3. That the defendant is responsible for all damages resulting from the negligence or misconduct of his servant, in the regular course of his employment.

Hopper and *Clarkson*, for defendant.

The following charge to the jury was delivered by

[Myers v. Snyder.]

BELL, J.—This is an action on the case, to recover damages for injuries suffered by the plaintiff, from the negligence of the defendant or his servants, in suffering a certain cellar to remain open during the night time, without a guard or fence of any kind, whereby the plaintiff, whilst engaged in his lawful business, fell therein and was severely and permanently injured.

It appears, the cellar in question was excavated under the direction of a certain Elijah Jones, who had been employed by the defendant to erect a brick building over it, in Morris street, in this city. The ownership of the property and the employment of Jones by the defendant, are undisputed facts. These bring the case within the operation of the legal principle which makes a master or employer responsible for the illegal acts of commission or omission, short of wilful wrong, done or suffered by his servant or agent, in the prosecution of the business intrusted to him by his principal, whereby third persons are injured.

It may seem harsh to make one person liable in damages for the misfeasance or nonfeasance of another, but the rule to which I have adverted is founded in motives of public policy, having for its object the protection of the rights of other members of the community. As it is said to be a privilege to allow a man to substitute another for the transaction of business, the law exacts, as the price of this privilege, that the principal stand responsible for the misconduct of his agent. A distinction has been attempted at the bar, between an ordinary agent or servant, employed to discharge a particular function, or to carry on a general business, and a contractor or undertaker for the erection of a building, as is the case in the present instance. But I have failed to perceive the difference. The reason of the rule is as applicable to the latter species of agent as to the former, and, therefore, both are included within its operation. It will be perceived, that what has been said on this head, is in affirmance of the third point submitted by the

plaintiff. The action is founded in imputed negligence, and if there was such negligence here, either upon the part of the defendant himself, or of his agent—though without any personal default in the defendant—as, in law, entitles the plaintiff to damages, he may recover in this action.

Has there been such negligence? It is a principle that one engaged even in the prosecution of a lawful work, is bound to use such care and caution in carrying it on, as will, reasonably, enable others, by the practice of ordinary prudential care, to avoid personal hurt, and prevent injury to their property. In the case of excavations, more especially in public places, it is the duty of those owning or having them in charge, so to guard and fence them, or, at least, to give such warning notice of their existence, as will be sufficient to prevent others, using ordinary caution, from falling into them. As, for instance, where there is a mine-shaft on a new or public thoroughfare; an area in front of a house; a well or other opening in, or contiguous to, a public street: in all these cases, if the owner omit to protect or fence them so as, reasonably, to prevent accident and consequent injury to others, he is guilty of such negligence as will subject him to answer for any damage resulting from his omission. I know of no difference, in the application of this principle, between an excavation for the cellar of a house, about to be erected, and the other like openings to which I have referred, and I perceive no sufficient reason upon which such a difference could, with propriety, be founded. Each may be productive of the same mischief, and, therefore, it would seem, ought to be within the same remedy. For this reason, I feel constrained to return an affirmative response to the plaintiff's first point.

But before you find a verdict for him you ought to be satisfied the accident from which he suffered was not the result of his own gross carelessness. Every one is bound, in cases like the present, to use the care and caution which would characterize the conduct of a prudent person, and if

he suffers from the absence of such ordinary caution, he cannot impute his misfortune to another. If the plaintiff recklessly or foolishly walked into the cellar when, by using his eyes or other ordinary means of ascertaining its presence in his path, he might and would have avoided it, he is not entitled to recover.

But the jury are not to conjecture that the fact was so. You should be satisfied, either by some direct proof or from the circumstances shown by the evidence, that such ordinary care was not used. That the plaintiff was found in the cellar, very materially hurt and in a state of great suffering, is put beyond question. How did he get there? This question it is for you to answer upon all the proofs in the cause. When responding to it, you may look to probabilities and adopt that you shall judge to approach nearest the truth, as indicated by the evidence.

With the qualification conveyed by the remarks I have offered on the subject of the caution to be exercised by the injured party, the plaintiff's second point is affirmed. In considering this point of the case you will pass in review the time, the occasion, and all the incidents which preceded, attended and followed the accident. This will probably remove all difficulty in the way of a correct conclusion.

The subject of damages is peculiarly for you No malice or wilfulness on the part of the defendant is alleged here. It is therefore not a case for vindictive damages: compensatory damages are all that can be asked, and the standard of these is the bodily suffering the party has undergone and the pecuniary loss inflicted by the personal injuries of which he complains. This last includes, of course, the permanent disability of pursuing his prior active and accustomed employment, under which he must continue to labour.

There was a verdict for the plaintiff for $800 damages.*

* The doctrine of the foregoing case is sustained by the decision in *Bush* v. *Steinman*, 1 Bos. & Pul. 404, which, however, (except in cases of nuisance)

as well as *Randleson* v. *Murray*, 8 Ad. & El. 109, have been denied, in the later English cases, to be law. See *Quarman* v. *Burnett*, 6 Mees. & Wels. 499; *Rapson* v. *Cubitt*, 9 Mees. & Wels. 710; *Milligan* v. *Wedge*, 12 Ad. & El. 737; *Allen* v. *Hayward*, 7 Q. B. 960; *Reedie* v. *North-western Railway Co.*, 4 Exch. R. 244; S. C., 2 Am. L. J. 507; *Knight* v. *Fox*, 20 Law J. Rep. (N. S.) Exch. 65; 14 Jur. 963; 1 Eng. L. & Eq. Rep. 477. The application of the general doctrine is there denied where the relation of the parties is that of principal contractor and sub-contractor, and it is now held that such principal contractor is not responsible for the wrongful acts or negligent conduct of servants employed by such sub-contractor in the prosecution of the work, except, perhaps, in cases where the acts complained of amount to a nuisance. The case of *Bush* v. *Steinman* is, however, recognised as sound law in this country; 23 Pick. 24, 31; 2 Denio, 433, 443.

Le Maistre and wife *v.* Hunter.

[APRIL 2, 1851.]

To sustain an action for malicious prosecution, the plaintiff must establish affirmatively, that the prosecution originated in the malice of the defendant, and was without probable cause.

The presumption is, that every public prosecution is founded on probable cause.

Malice may be inferred from the want of probable cause, but if there is probable cause for the prosecution, it matters not what malice may appear to exist.

But, proof of malice, although not sufficient where there *is* probable cause, contributes its aid, nevertheless, to the evidence of want of probable cause.

The question of probable cause is a mixed question of law and fact; the court determines whether a certain state of facts amounts to probable cause, and the jury decides whether such a state of facts exists.

Probable cause is a reasonable ground for suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offence charged; but, if this belief was induced alone by the prosecutor's own gross error, mistake, negligence or management, it will not amount to probable cause.

If the prosecution, though without probable cause, was instituted under an error of judgment, and without malice, the action cannot be sustained. But if want of probable cause is shown by the plaintiff, then the burden of proof of the absence of malice is thrown upon the defendant.

[Le Maistre v. Hunter.]

A plea of justification put in by the defendant, after knowledge of the plaintiff's innocence, is of itself evidence of malice.

The abandonment of the prosecution, or the neglect or omission of the defendant to make good his charge against the plaintiff, is not, of itself, evidence of malice, or of want of probable cause.

The opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly and truly stated. Even a conviction, if obtained by false testimony, wholly or chiefly, would be the subject of a malicious prosecution, if the prosecutor had reason to suspect its falsity, and had not reason to believe in its truth.

What facts would amount to probable cause.

A husband is answerable *civiliter*, for the acts and defaults of his wife; therefore, it is no justification, in an action for malicious prosecution, that the defendant's wife untruly stated to him facts sufficient to induce him to believe the plaintiff guilty of the offence charged, and confirmed her statement under oath; if *she* knew such statement to be untrue.

The question of probable cause does not turn on the actual guilt or innocence of the accused, or upon the belief of the prosecutor, but upon whether there was reasonable ground to believe him guilty.

This was an action on the case for a malicious prosecution. The facts of the case, so far as is necessary for a proper understanding of the questions of law involved, will appear in the charge of the court.

The jury were addressed by *B. Rush* and *D. P. Brown*, for the plaintiffs; and by *Dallas*, (with whom was *Barnes*) for the defendant.

Rogers, J., charged the jury as follows:—This is an action for a malicious prosecution. The action is founded on a warrant, issued on the oath of the defendant and his wife, in July, 1849. On this warrant, Eliza Le Maistre was arrested, and, after examination before Alderman Davis, and on the oath of the defendant and wife, in default of bail, was fully committed: she remained in prison for upwards of eighteen hours, when she was discharged from custody. A bill of indictment was preferred against her, but, from default in the appearance of witnesses, or for

some other cause not explained, the bill was returned "*ignoramus*," by the grand jury.

If the case rested here, without any additional proof, your verdict would be for the defendants. In that case, there would be such probable cause for the prosecution, (hereafter to be explained) as would be a sufficient justification for the defendants. The presumption is, that every prosecution is founded on probable cause.

This, gentlemen, is an action on the case for a *malicious* prosecution, and the law is, that an action lies against any person who, maliciously and without probable cause, prosecutes another, whereby the party prosecuted sustains an injury in person, property or reputation. To support the action, it is necessary for the plaintiff to establish to your satisfaction two things; first, that the defendant was actuated by malice; and, secondly, that he prosecuted the plaintiff without probable cause. If the plaintiffs have not satisfied the jury that the prosecution of which they complain was instituted without reasonable or probable cause, and also with malice, your verdict must be for the defendant. The burden of proof is thrown upon the plaintiffs. As has been before remarked, the presumption is, that every public prosecution is founded on probable cause.

When a prosecutor proceeds without probable cause, malice may be, and most commonly is, inferred; but when there is probable cause, it matters not what malice may appear to exist. If there be probable cause, no action can be sustained. Proof of malice, although not sufficient where there *is* probable cause, contributes its aid, nevertheless, to the evidence of want of probable cause. On the question of malice, the jury will decide. The question, however, of probable cause, is a mixed question of law and fact. The court determines whether a certain state of facts amounts to probable cause; the jury decides whether such a state of facts exists.

From this statement of the law, (which is clear and un-

questionable) the jury will not fail to observe, that the principal question which you will have to determine is, had the defendant probable cause for the institution of criminal proceedings against the plaintiff's wife. If he had, then there is an end of the plaintiff's case. If he had not, and you should believe he was actuated by malice, which may be inferred, as before observed, from the want of probable cause, then your verdict will be for the plaintiff.

What, then, is meant by probable cause? Probable cause is a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offence; but if this belief was induced alone by the prosecutor's own gross error, mistake, negligence or management, it will not amount to probable cause. In this part of the case, I will remark to you, that, although if you think the evidence does not establish the existence of probable cause for the prosecution, you may, in the absence of explanatory evidence, presume malice from the want of probable cause, yet, if the evidence has satisfied you, that the prosecution, though instituted without probable cause, was instituted under an error of judgment, and without malice, your verdict should be in favour of the defendant. But, you will recollect, that if a want of probable cause is shown by the plaintiff, then the burden of proof of the absence of malice is thrown upon the defendant. And here let me say to you, that the plea of justification put in by the defendant, after knowledge of her innocence, is of itself evidence of malice. Let me again repeat, that to maintain this suit, the plaintiff must satisfy you of two things; first, the want of probable cause; and, secondly, that the defendant was actuated by malice against the plaintiff's wife. and here, let me remark, that the abandonment of the prosecution, or the neglect or omission of Hunter to make good his charge, is not, of itself, evidence of malice, or of want of probable cause; for, the prosecution may have

been commenced and abandoned (and of this you will judge) from the purest and most laudable motives, and not to gratify private malice. If, then, you should believe that the conduct of Mrs. Le Maistre, although it might be insufficient to establish the charge against her, was such, as to create in the minds of Mr. and Mrs. Hunter a well-grounded suspicion of her guilt, there was probable cause for the prosecution, and your verdict must be for the defendant.

In conformity to a point put by the counsel for the plaintiff, I instruct you, that the opinion of private counsel of a prosecution, cannot amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly and truly stated. Even the application to counsel, and the opinion of counsel, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time, must be fair, and full, and consistent with that purpose. Even a conviction, if obtained by false testimony, wholly or chiefly, would be the subject of a malicious prosecution, if the prosecutor had reason to suspect its falsity, and had not reason to believe in its truth.

In connexion with the question of probable cause, I have been requested by the defendant's counsel, to instruct you, that the following facts and circumstances would constitute probable cause for the institution of the prosecution by the defendant, viz.—that his wife had a habit of hiding money; that, before the 16th of July, 1849, she was seen in the possession of large sums, in gold coin; that while at Mr. Le Maistre's, she told Mrs. Le Maistre, that she had in a copper kettle, hanging up in a particular part of his premises, which she described, gold coin to the amount of $435 or $445, and asked Mrs. Le Maistre to go for it; that Mrs. Le Maistre went, on two occasions, to the house of defendant, while his wife was at Mrs. Le Maistre's;

that on one of the last of these occasions, she went into the reception room, while the defendant was dressing, in his own apartment; that the reception room opened into dining room, beyond which was the place where the copper kettle hung; that when defendant had dressed himself, and while in the entry or lobby, on his way to the reception room, to see Mrs. Le Maistre, he heard a noise, as of something that had fallen, and on going into the reception room, he met Mrs. Le Maistre, as if coming from the dining room, rubbing herself, and apparently agitated; that after Mrs. Le Maistre had left his house, Mr. Hunter went into the closet or recess, and there saw the copper kettle lying on the floor; that when Mrs. Hunter returned to her own house, she declared, first, to several of her friends, and, afterwards, to her husband, that she had been robbed of the money she had put in the copper kettle; that she had left it there when she went away, and it was gone when she came back; and that she confirmed these positive assertions by her oath, before Alderman Davis; and if the jury believe these facts and circumstances to be established by the evidence, as well by the testimony of Mr. and Mrs. Hunter, before Alderman Davis, as by other testimony; then their verdict must be for the defendant.

This point contains an embodyment of all the facts bearing favourably on the side of the defendant, overlooking those facts which sustain the plaintiff's case. If, however, you should believe, from a consideration of the whole case, those facts and circumstances are established by the evidence, then, the defendant is entitled to an affirmative answer. They would amount to probable cause for the institution of the proceedings against Mrs. Le Maistre, and of course, would be a complete justification of the defendant.

But, the jury will recollect, there are other facts and circumstances in evidence besides those enumerated in the point, which you will be called on to consider. Those facts are not left uncontradicted, and, of course, you will

decide the case on the whole evidence, as well that of the plaintiff, as the defendant.

In determining the question of probable cause, there is one thing the jury will not fail to remember. This is the case of husband and wife. In law, husband and wife are one; he is answerable, *civiliter*, for her acts and defaults. This whole matter originated with the wife, and in this case they cannot be separated. I cannot, therefore instruct you, as requested by the counsel for the defendant, that so far as respects the existence of the money in the copper kettle, if the jury believe that Mrs. Hunter solemnly assured the defendant of that fact, and confirmed that assurance under oath, although it might be untrue, it constitutes probable cause to justify Mr. Hunter in instituting the prosecution. However we may deplore his hard fate, in having a worthless wife, yet, we cannot relieve him from the unpleasant situation in which she has placed him. If Mrs. Hunter's story was untrue, she must have known it to be so; and, as it would have been without excuse, so it leaves Mr. Hunter without defence.

The first questien to which your attention will naturally be pointed is, had Mrs. Hunter a large amount of money to lose? Was this story a fabrication, to suit purposes of her own, or the result of some hallucination of mind arising from her unfortunate habits of intemperance? This is a matter by no means clear. On this point, there is a conflict of testimony, which, of course, you will decide, and on which it is not my intention to intimate any opinion. If, however, you should believe she had not the money to lose, it will be entitled to great weight in the decision of the case. Mr. Hunter must answer for the misdeeds of his partner; as he has enjoyed the benefits of her good qualities, (and, it seems, she had some,) he must bear with whatever patience he may, the consequences of her faults. It is his misfortune to have put confidence in the representations of such a woman as she has been proven to be.

If the jury should think that she had the money to lose, then you will consider in what way it was lost. Was it stolen, and by whom—or was it lost from her person, or mislaid, in consequence of her deplorable habit of drunkenness? If the latter, and she knew of it, or had reason to know it, there is but little excuse for the defendant. She either communicated it to her husband, or ought to have done so. And, if so, it will be for you to say, whether there was such reasonable cause of suspicion against Mrs. Le Maistre, as would justify a prudent and cautious person in instituting a criminal prosecution for theft against her.

In this part of the case, it is my duty to remark, that it would be a great discouragement to the public justice of the country, if prosecutors who have a tolerable or reasonable ground of suspicion, were liable to damages whenever they failed in the prosecution. Such actions are not to be encouraged; nor are they altogether to be discouraged, for, no person can be permitted, under colour of law, to gratify his evil passions and malice against his neighbour. Whether Hunter had reasonable grounds to suspect Mrs. Le Maistre of larceny, or used the forms of law as a cloak to hide his malice, or any other evil purpose, will be for you to determine. If you find that Hunter and his wife, or either of them, believed Mrs. Le Maistre to be innocent, it would be such malice and want of probable cause as would warrant a verdict for plaintiffs. You have heard the evidence and the remarks of counsel, and must determine this matter for yourselves.

The jury will inquire whether Hunter and his wife had reason to believe a larceny had been committed by some person. Next, had they reason to believe, and did they believe, that the theft was committed by Mrs. Le Maistre? Did Hunter act precipitately, unadvisedly, rashly, wantonly and wickedly; or did he act prudently and cautiously? If you answer the first two questions affirmatively, and it is

for you to determine how they are to be answered, your verdict must be in favour of the defendant. If, however, you should believe that the defendant acted hastily, unadvisedly, rashly, wantonly and wickedly, not with proper prudence and caution, or that they knew her to be innocent, you will find for the plaintiff, and assess such damages as you may think proper.

And here it is my duty to remind you, that the question is not whether Mrs. Le Maistre is guilty or innocent, (it is conceded she is innocent) or whether he believed her to be guilty, but whether there was reasonable ground to believe, and it was believed, that she was guilty. If you find, gentlemen, that the prosecution was instituted without probable cause, and with malice, then it will be your duty to estimate the damages to which the plaintiff may be entitled. This is a question exclusively for the decision of the jury; there is no certain rule to be applied to it; it must depend on the facts and circumstances in evidence.

Damages are of two kinds; first, compensatory; and, secondly, exemplary or vindictive damages. Compensatory are such as remunerate the plaintiff for the injury he has actually sustained, either in his person, or for expenses incurred. Exemplary or vindictive damages, when it is necessary to make the defendant an example, for any great cruelty, excessive malice, &c., or any unusual circumstances attending the case.

Verdict for plaintiff for $75 damages.

INDEX.

THE END.

WHARTON'S

AMERICAN CRIMINAL LAW.

LATELY PUBLISHED BY

KAY & BROTHER,

LAW BOOKSELLERS,

No. 193 MARKET STREET, PHILADELPHIA:—

A TREATISE on the Criminal Law of the United States, comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania, and Virginia: with the Decisions of Cases arising upon those Statutes; together with the English and American Authorities upon Criminal Law in general. In one octavo volume.

BY FRANCIS WHARTON.

RECOMMENDATIONS.

From the Chief Justice of the United States.

WASHINGTON, January 26, 1847.

GENTLEMEN:—I have looked with some care into Wharton's American Criminal Law, which you were kind enough to send me.

It gives me pleasure to say that, in my opinion, it is a work of much merit. Its references to different State Laws and decisions in criminal cases, and more especially to decisions made by the Courts of the United States upon the laws of the United States, give it a peculiar value to the American Bench and Bar, which no English work can possess, and must, I think, procure for it the general patronage and support of the Profession.

R. B. TANEY.

Messrs KAY & BROTHER, Philadelphia.

From Chancellor Kent.

Wharton's American Criminal Law.—I have examined the whole work, turned over every page, and read a very considerable part of it, and I consider it a work of the highest utility, and admirably executed. There was no work on American Law more wanted, and it will be generally called for, studied, and adopted. I congratulate you on the publication and undoubted success of a work of so much labour, industry, and judgment.

New York, Nov. 3, 1846.

From Mr. Justice Grier, of the Supreme Court of the United States.

Messrs KAY & BROTHER:

You had the kindness some time ago to send me a copy of "Wharton's Criminal Law." My engagements have been such as to prevent a close and critical examination of the

work; but I have had occasion to consult it with great advantage several times in the course of my official duties. A work of this kind, on Criminal Law, which would afford a synopsis of the decisions of the Courts of the United States, and of the several States, connected with the English cases, was much needed. The execution of the work you have just published, reflects great credit on its author for his learning and industry, and I have no doubt it will receive the approbation and patronage of the Profession.

Washington, Jan. 4, 1847.

From Chief Justice Gibson.

Messrs KAY & BROTHER:

Mr. Wharton's American Criminal Law, which you sent me some time since, I find to be an excellent book. The plan is judicious, and its execution able. As a book of reference the volume will be a valuable addition to the American Lawyer's library.

Philadelphia, January, 1847.

From the Hon. John C. Calhoun.

FORT HILL, 23 March, 1847.

I have devoted the first leisure I had, since my return from Washington, to examining Wharton's American Criminal Law. I regard the subject as one of much importance and take great pleasure in saying that, in my opinion, the arrangement and execution of the work do the author great credit.

From the Hon. Edward King.

Messrs KAY & BROTHER:

I have great pleasure in acknowledging the receipt of a Treatise on the Criminal Law of the United States, by Francis Wharton, Esq. I regard the work as one of peculiar merit; admirably suited to furnish clear and precise ideas of the state of the Criminal Law, not only to the student, but to the more matured practitioner. I shall be much mistaken in my judgment if it should fail to secure the general approbation of the Profession.

Philadelphia, Nov. 28, 1846.

From Simon Greenleaf, L. L. D., Professor of Law in Harvard University.

CAMBRIDGE, 14 April, 1847.

MESSRS KAY & BROTHER:

I have looked over Mr. Wharton's Treatise on American Criminal Law with as much attention as my avocations would permit, and think that for clearness of method, compactness and elegance of finish, it will prove most acceptable to the Profession. We have no similar Treatise; and to practitioners in the Criminal Courts this manual must be of great use.

From the North American, September, 1846.

Wharton's American Criminal Law is one among many evidences of the improvements introduced by the Kays in the style of publishing law books. They have redeemed this branch of our scientific literature from the dingy paper and battered type in which it was so long buried; and over the clear pages of their publications, the professional student rejoices in the exemption from the dangers heretofore incurred from the war against eyes so long waged against lawyers. That this work is far in advance of any hitherto published in this country upon Criminal Law, will not be gainsayed by any one who has examined it; but we regret to find the statutes of but four States incorporated. A future edition will doubtless comprise a perfect review of American law in all the States—that is, in all where they boast a penal system beyond the jurisdiction of Judge Lynch. * * * *

The work before us is important, because it is the first valuable effort to instruct our people that there exists an American Criminal Code. We have too often been heretofore administering English Criminal law, harsh, bloody and reckless as are its spirit and principles; and English decisions have too often tinged American law with the British temper

We have, it is vain to deny it, a common law of our own, arising from the temper, condition and principles of our people. For instance, though Chitty and Russell, Archbold and Roscoe, recognize the right at common law of the husband to chastise his wife, what American judge would dare to administer the law in accordance with such principles? We have an American code, not merely arising from statute, but from custom and necessity; and the great difficulty has been that no attempt has hitherto been made to embody and harmonize it. We find this deferred duty performed, and admirably too, by Mr. Wharton. In giving this volume to the Profession he has not merely paid the tribute which all lawyers are, by high authority, said to owe it; but he has contributed vastly to the important work of erecting a system of Criminal Law, in its leading principles common to the entire Republic, and worthy the advances made by the American people in the science of government.

In a careful examination of this work, we noted down many points worthy, as it seemed to us, the consideration of the Public as well as of the Profession; but we have already transcended the limits which a regard for the general character of our journal assigns us for such a subject. Let us speak of the work. We commend it, with all emphasis, to the Profession. In its arrangement, its mode of treating the subjects considered, its citation of authorities upon disputed points, in short, in all that a practitioner in a Criminal Court needs, we consider it by far the best work within reach of the American lawyer. It manifests great industry in the collection of authorities, and great ability in their collation; and embodies a mass of information, condensed and arranged with a skill no where else to be found. He must be singularly elevated above the ordinary necessities of the legal Profession, to whom this work is not indispensable.

From Hunt's Merchant's Magazine, February, 1847.

Wharton's American Criminal Law.—Such a work as this has long been a desideratum with the Profession. The works of Barbour and the Davis's—the only American treatises, strange to say, attempted, upon the same subject—amount to simple examinations into the duties of justices of the peace, and as such are beneficial only to those who stand in need of the most elementary expositions of Criminal Law. The book of Mr. D. Davis, it is true, also goes to enlighten citizens as to their office when called upon to act as grand jurors; but this scarcely enlarges its sphere of usefulness. Practitioners at the Bar have been hitherto obliged, for their part, to rely upon the labours of Chitty, Russell, Archbold, and Roscoe, who give us the old crown law, which the British judicial decisions added to it—a code, which every day causes to differ more and more from our own, which is the offspring of freer institutions and a larger personal liberty. The ordinary expedient, of compensating for the defects of these writers by a supply of domestic foot-notes and references, has become altogether insufficient; since the decisions of our Courts have so increased in number as to be often of really more importance than the English text upon which they profess to comment. It is on this account that the work now before us, has been so sincerely welcomed. Its author is Mr. Wharton, a gentleman whom Pennsylvanians have been complimenting for his able performance of the duties of prosecuting attorney of the Commonwealth, for Philadelphia. It is what it professes to be—the Criminal Law of the *United States* digested, as well as compiled, and possessing every requisite that could be desired in it. An able legal writer has remarked upon the concluding book, On Trial and its Incidents, that the reader will find in it, "the subject, not only masterly treated, but an amount of information embodied, divided, and digested, in a manner altogether unattempted in any previous work on Criminal Law, English or American." This may be said truly of all of the six books of which it is composed. It is, throughout, executed in a painstaking and industrious, yet finished and scholarlike manner.

From the New York Tribune, November, 1846.

Wharton's American Criminal Law.—This is a treatise on Criminal Law which we consider one of the most valuable which has yet been given to the Public. It is composed of six books, lucidly arranged and ably expounding the subjects on which they treat. It is a volume valuable not only to the student and professional advocate, but also to every citizen desirous of becoming acquainted with Criminal jurisprudence. In the few treatises we already possess, the attention of the authors has been more confined to the examination of local statutes defining particular offences than applied to the investigation of general principles; but the present volume not only gives in ample detail the statutes defining offences

where the common law is silent, but shows what alterations and restrictions affect the common law, and are peculiar to the government under which we live. The judicial decisions on mooted points of the various Federal and State Courts are set forth with much discrimination, and in such a manner as to show the reasons governing the adjudication of the subject in dispute. The examination of what offences are indictable, and in what court cognizable, of principal and accessary, and an inquiry into the powers of the respective State jurisdictions, of the form and finding of the indictment, of demurrers and pleas, compose the first book. The second and third books relate to evidence and offences against the person; the fourth and fifth books to offences against society; and the sixth to the trial and its incidents. The multifarious subjects treated of in the different books, are accompanied with references to the judicial decisions sustaining the text. Those references are very copious, comprising the latest decisions of the English and American courts. Among the mass of valuable and well-digested information, will be found much that is peculiar to the work itself, and which supplies the deficiencies of other treatises. It is peculiarly acceptable to the inexperienced practitioner, who can acquire more knowledge from its perusal, than he could otherwise obtain by the loose reading and practice of years. It occupies the same relative position to our Criminal Law, that is occupied by Russell, Roscoe, and Archbold, in British jurisprudence; and we hail with pleasure and with pride the existence of a work bearing the impress of American genius, and which in legal literature will, we doubt not, be found in the library of every lawyer, beside the productions of a Story and a Kent. We understand that the author is but a young man, who has thus given to his professional brethren and the Public this evidence of a matured and powerful mind; and much do we hope that the success which will attend the present work will prove an incentive to renewed exertions in his legal research and literary labours.

From the Legal Intelligencer, August, 1846.

Wharton's American Criminal Law.—This work is the production of a highly accomplished criminal pleader, whose recent services in the conduct of the public prosecutions of the county of Philadelphia secured for him the best regards of the community, and have prepared his professional brethren to accept his book as one of full authority in the law.

It is the first and only thorough treatise on the Criminal Law of our country that has found its way to the press. It includes not only the descriptions and distinctions of the several classes of crime, as known to the common law of England, and as modified by the statutes of the Union or of the States, with an analytical and well expressed summary of the decisions to which they have led; but it enters largely into the departments of practice, pleading, and evidence. Thus, the first book treats of indictments, the duties and power of grand juries, and the rights of the accused; the second is a liberal abstract of the principles and minor rules of proof; the three next are appropriated to the consideration of offences against the person, against property, and against society, under thirty-eight distinct titles; and the sixth is devoted to the modes of trial, and all its incidents.

This last will be found peculiarly valuable to the practitioner; especially the chapter on the motion for new trial, a topic very imperfectly discussed in other treatises, but which in Mr. Wharton's hands is as full of interest as it is confessedly important.

The whole work bears the marks of a clear, well disciplined, and practical mind, entirely familar with all the details and difficulties of the subject, leaving nothing to doubtful inference, but marking, by clear and copious quotations, the precise line, beyond which precedents cease to guide, and resort must be had to analogy or induction. We hazard nothing in the remark, that hereafter the treatise of Mr. Wharton will be a manual for every practitioner in our Criminal Courts.

From the Boston Law Reporter, January, 1847.

Wharton's American Criminal Law.—We hasten to say that we think it a book worth its price to the criminal practitioner. It contains a much fuller collection of American cases than Russell, with the able editing of Mr. Metcalf at an early day, and of Mr. Sharswood in 1844; or than Chitty, with Mr. Perkins's valuable notes, (ed. 1841); or than Roscoe in Mr. Sharswood's edition of 1840. Neither is it an imitation or revamping of any of the treatises with which we are acquainted. It wants at present a table of cases, and a better index, which, perhaps, have led to a greater complaint of deficiencies on our part

than really exists; but with these, which we trust the author will by all means supply in a future edition, we hesitate not to say that it will be really serviceable to any one who is disposed to investigate the Criminal Law of the Union.

From the Western Law Journal.

Wharton's American Criminal Law.—This work, recently published in Philadelphia, supplies a want which was very much felt by all engaged in the trial of criminal cases. There has been heretofore no American work upon Criminal Law, so thorough in its details as to be of general utility. This book is intended to present the Criminal Law as it exists in the United States. It treats of the progress of the cause from the arraignment of the prisoner to the final judgment; of the duties of grand jurors, the indictment, and the different offences punishable by law. Portions of the criminal statutes of the United States New York, Massachusetts, Pennsylvania and Virginia, are set out, and references are given to such of the English decisions as are applicable in this Country. The decisions of all the States of the Union are also embraced, either in the text or the notes, and probably none of the American authorities have escaped the vigilance of the author. The arrangement is methodical, and the index renders reference easy. The book bears evidence of great research and industry, and may be recommended as an important addition to our law library.

WHARTON'S

PRECEDENTS OF INDICTMENTS AND PLEAS.

Precedents of Indictments and Pleas, adapted to the use both of the Courts of the United States and those of all the several States: Together with Notes on Criminal Pleading and Practice, embracing the English and American Authorities generally. By FRANCIS WHARTON, Author of a Treatise on American Criminal Law. In one thick octavo volume.

This work, and its predecessor, Wharton's American Criminal Law, comprise: the latter the Theory, and the former the Practice of the Law in the United States. Together they form a Complete Body of the American Law on the subject. Although entirely independent of each other, they are intended to be used jointly, and may be considered as two volumes of one work.

From an Opinion delivered in the Philadelphia Criminal Court, October Term, 1848, by the Hon. A. V. Parsons, Judge of the said Court.

"While there has been found a Massachusetts precedent in favour of this bill, and pronounced incorrect, there is a Pennsylvania precedent averring the name of the husband. It will be found in a book about to be presented to the profession by Francis Wharton, Esq., the accomplished author of 'Wharton's American Criminal Law.' This new work, to which I refer, is entitled 'Precedents of Indictments and Pleas.' See page 584. In thus referring to this new authority, not yet in circulation, I cannot forbear remarking that I have examined a volume of it with considerable attention, and in my opinion the precedents are selected with great ability, and every pleader will find them generally, and perhaps without exception, safe to follow. On most of the important subjects of which the writer treats, he sustains the pleadings, by reference to the best authorities, in valuable notes, which will be of great assistance to every pleader in this branch of the law. There is a brevity and clearness in most of the forms, which I think cannot fail to commend the book to every lawyer and judge, and if these are followed, our records will be relieved of much unnecessary verbiage. Nor can this remark be better illustrated than by referring to the form the author has prescribed in a case like the present, which is as follows: 'That C. B. of, &c., wife of J. B., on, &c., at, &c., then and there being a married woman, and having a husban

in full life, adultery with a certain J. R. of the same country, mariner, did commit, contrary, &c., and against, &c.' Now this is much shorter than the bill before us, and contains all that is necessary for a full statement of the crime, its nature and circumstances."

From the Pennsylvania Law Journal.

Mr. Wharton states in the preface, that it was his intention to have added to his Treatise on American Criminal Law, a collection of Precedents of Indictments and Pleas, suited to the use of practitioners throughout the Union. He gave up this intention, however, because the varying systems of the Federal and State Courts, and the large amount of Notes required by the newness of the material and the increasing intricacy of criminal pleading, required more space than could be spared in the work.

The present publication is divided into six books, of which the first contains Precedents of the general form of Indictments; the second, the Forms applicable to Accessories; the third, to Offences against the Person; the fourth, to Offences against Property; the fifth, to Offences against Society. The sixth book contains Precedents of Pleas.

Of the whole work we need only say, that unusual care appears to have been taken to collect the Forms which are in use in different parts of the country. The notes are very full, and a great number of authorities are cited. The work will be valuable not merely to prosecuting officers, but to all lawyers practising in the Criminal Courts.

From the Boston Law Reporter.

This work is an octavo of about 700 pages, handsomely printed on good paper. In the first book is given a general form of indictment, with caption, commencement and conclusion, adapted to the Federal Courts and to those of the several States; and to each averment in the text is attached a note incorporating the doctrine bearing upon it. The indictments relating to each individual offence are in like manner preceded by a general preliminary form, to which are appended notes, divided on the same principle of analysis. The labours of the intelligent author appear to have been performed with care and ability. Under the head of the Accessories, at pp. 32–34, we have a long note embracing the English and American authorities. Under Homicide, at pp. 42—47, we have similar notes of great length and value. We may say the same of the notes under the head of Forgery, pp. 129–136; Arson, pp. 183–188; Larceny, pp. 190–192; False Pretences, pp. 239–243; Perjury, pp. 277–282; and Libel, pp. 545–548. But the notes under the head of Conspiracy, pp. 330–353, are particularly deserving of attention. They display great research, industry and judgment, and they derive increased interest from the remarks of the author upon the recent decision of the Supreme Court of Pennsylvania, in the Comm. *v.* Hartman et al. (Lewis C. L. 222.) The manner in which he examines the principles of that decision, in connexion with other English and American decisions bearing on the same point, is worthy of commmendation. Under the head Bribery, the celebrated indictment against M'Cook, for attempting to bribe a member of the Legislature, is given, together with the able opinion of Judge Eldred, holding that the offence is indictable at common law.

There is an interesting note under the head Abortion, p. 109, in which the author does himself credit in drawing freely from a kindred science the light necessary to illuminate his path.

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There is an excellent Index. The book of Mr. Wharton is upon the whole a highly valuable contribution. Its copious collection of American Precedents gives it a value in Criminal Practice which we think no other work possesses.

VALUABLE LAW BOOKS PUBLISHED BY KAY AND BROTHER.

ALSO, LATELY PUBLISHED BY

KAY & BROTHER, LAW BOOKSELLERS:—

WATTS AND SERGEANT'S REPORTS, VOL. 9.

REPORTS of Cases adjudged in the Supreme Court of Pennsylvania, by Frederick Watts and Henry J. Sergeant; vol. 9, containing the Cases decided in part of May Term, 1845. With a general Index of the principal matters contained in the nine volumes of Watts and Sergeant's Reports, and a Table of all the Cases in the same. In one octavo volume.

N. B.—The General Index contained in the 9th volume of Watts and Sergeant's Reports, (preceded by the 4th and last edition of Wharton's Digest) forms a complete Digest of the Decisions of the Supreme Court of Pennsylvania, from the commencement to the year 1845; and thus for years relieve the Profession from the expense of paying once more for matter, the far larger portion of which they already possess in their Libraries.

ROBERTS'S BRITISH STATUTES IN FORCE IN PENNSYLVANIA.—SECOND EDITION.

A DIGEST of Select British Statutes, comprising those which, according to the Report of the Judges of the Supreme Court, made to the Legislature, appear to be in force in Pennsylvania, with some others; with notes and illustrations. By Samuel Roberts, President of the Court of Common Pleas of the Fifth Judicial District of Pennsylvania. Second Edition, with additional notes and references to English and American Decisions, giving construction to these Statutes, down to the present time; and also, the Report made by the Judges of the Supreme Court to the Legislature. By Robert E. Wright, Counsellor at Law. In one volume, octavo. Kay & Brother, Philadelphia.

From the Pennsylvania Law Journal, February, 1847.

A new Edition of Roberts's Digest has been for some time a desideratum. The number of British Statutes in force in Pennsylvania, notwithstanding the labour of the Revisers of the Civil Code, is still considerable, and the importance of their careful preservation cannot be overrated. The Editor of the present volume has carefully preserved the arrangement, even to the paging of the original text; has added, on the authority of the Supreme Court, several Statutes, which are not contained in the first Edition, and has enriched the whole with valuable Explanatory Notes and References. The Report of the Judges of the Supreme Court of Pennsylvania is also prefixed.

HOOD ON EXECUTORS, ADMINISTRATORS, &c.

A Practical Treatise on the Law relating to Registers, Registers' Courts, Orphans' Courts, Auditors, Executors, Administrators, Guardians and Trustees, in Pennsylvania, with Appendixes of Acts of Assembly, Forms, &c., and an Index. By Samuel Hood, of the Philadelphia Bar. In one large volume, octavo. Kay & Brother, Philadelphia.

From the Hon. Judge Ellis Lewis.

LANCASTER, Feb. 15, 1847.

Hood on Executors.—The People and Profession are deeply indebted to Mr. Hood for his valuable work relating to the Registers' Courts, Orphans' Courts, Executors, &c. The practice in this branch of jurisprudence is so moulded by our peculiar legislation and usages, that we look in vain into English books for light. The work of Mr. Gordon was of

great value, but in the twenty years which have elapsed since it made its appearance, an entire revolution has taken place, and a new work on the subject became a matter of urgent necessity. This book supplies the want, and satisfies the expectation of those most conversant with the subject.

Death is certain, and as sure as our lifeless bodies shall seek repose under the clods of the valley, our widows and orphans and their estates must seek protection under the jurisdiction of the Orphans' Court. Every man in society is most deeply interested in the enlightened and faithful administration of this branch of the law. In this country alone, the interests involved in it are of the highest importance in their nature, as well as immense in their magnitude.

The work is prepared with great care and ability. No Pennsylvania Lawyer should neglect to purchase it; it contains a mass of useful knowledge to be obtained nowhere else. It is gratifying to perceive that the publishers have taken care to present the work in a dress which recommends itself.

From an Eminent and Experienced Member of the Pittsburg Bar.

Hood on Executors.—In this age of book making—so many publications are thrown off by steam, and we are so oppressively taxed by all sorts of levies and temptations—that our first impulse is to resist all expenditures that we can avoid. This is especially true as to Law Books. The tools of the trade, if all that are offered were purchased, would come to more than the revenue of the Profession. Some selection being strictly necessary, any notice that tends to limit purchasers to works *really* useful and valuable, may be of general service.

There is no substitute for, or rival to "Hood on Executors" in our Libraries, for the use of the student or lawyer of Pennsylvania. "Gordon on Decedents" was edited before the Revised Code, and is therefore antiquated.

The whole Orphans' Court system of this State is original, peculiar, and of modern erection by eminent Judges. Its basement, laid in the leading case of M'Pherson *v.* Cunliffe, by the lamented Justice Duncan, has been built up in strength and symmetry by his colleagues of that era, and his successors; at the head of whom (and indeed, among the highest of any State or Nation, in his giant proportions as a lawyer and logician) stands that colleague, our present Chief Justice. The outline, elevations and plans of the system are presented in this Treatise in form and shape, distinct and definite to all.

The subject matter of the book is nearest to "*men's business and bosoms.*" The Work should be in the hands of every Magistrate and Officer of our Courts, and of every administrator of his own or of others' estates—and who is not one of these? Many, even the most judicious, in their best efforts of settlement prove to be but Executors *de son tort*, that is in their own wrong. He who would most surely escape this perilous office, had better choose for his guide, "Hood on Executors."

DUANE'S LAW OF LANDLORD AND TENANT.

A View of the Relation of Landlord and Tenant in Pennsylvania, as affected by Acts of Assembly and Judicial Decisions. By WILLIAM DUANE, Esquire, Author of a Treatise on the Road Laws of Pennsylvania. In one Duodecimo Volume.

From the Pennsylvania Inquirer.

Duane on Landlord and Tenant.—The Messrs. Kay, No. 183½ Market street, have just given to the public a most excellent duodecimo treatise of 136 pages, entitled "A View of the relation of Landlord and Tenant in Pennsylvania, as affected by Acts of Assembly and Judicial Decisions." It is from the hands of William Duane, Esq., and does infinite credit to that gentleman, not only for the clearness of its style, but its lucid and judicious arrangement of the Decisions upon the subject. The whole doctrine of Landlord's rights and Tenant's privileges, is treated in a clear and comprehensive manner. The work also includes a chapter upon "Ground Rents," and closes with a valuable Appendix of Forms. We think that the enterprising publishers have never issued a more practical and useful book upon a subject which has had the reputation of being one of the most confused in the law, but which Mr. Duane, by the judicious arrangement of the Decisions, has rendered very simple and intelligible.

From the Philadelphia Ledger.

Duane's Law of Landlord and Tenant.—This is the title of a volume published by Kay & Brother, the author of which is William Duane, Esq. The object of the present work is to show how far the law of England, in regard to the relation of Landlord and Tenant, has been recognised, modified or changed in this Commonwealth, by acts of the Legislature and the decisions of our Courts, and an attempt to reduce to order the various laws and decisions of Pennsylvania upon this branch of the law. Upwards of two hundred decisions of the Supreme Court of this State, besides several by the Court of Common Pleas of this county, and the District Court for the city and county, are condensed in it. It will be found a valuable and useful work.

GRAYDON'S FORMS.

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From the North American and U. S. Gazette.

The Messrs. Kay, No. 183½ Market street, have recently published a most excellent book. We allude to "Graydon's Forms," as edited by Mr. Wright. The work comprises not only the valuable collection of Graydon, but many most excellent and well tried forms not to be found elsewhere. No Attorney, Magistrate, or man of business, should be without it. The assistance such a book is likely to afford in emergencies must be great. For example, as in the case of drawing a will; and it may often prevent the sacrifice of the rights of those whose interests should be protected. We have no doubt the edition will be speedily exhausted.

From the Pennsylvania Inquirer.

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A Treatise on the Offices and Duties of Aldermen and Justices of the Peace, in the Commonwealth of Pennsylvania. This work includes all the required Forms of Process and Docket Entries. The Laws and Law Reports have been carefully examined, in order to embody not only whatever may be valuable to Justices of the Peace, but to Landlords, Tenants and General Agents; and also to make the volume what it purports to be, "A safe legal guide to business men." By John Binns, Alderman. In one octavo volume.

From the Hon. John B. Gibson, Chief Justice of Pennsylvania.

I feel confident that the book will fully bear me out in saying, it is a well-digested compend of all that is necessary to qualify a young magistrate for a useful and honourable discharge of his functions.

It offers to him the fruits of long experience and accurate research; and it opens to him a repository of legal principles, with minute directions for their use, from which he may readily draw whatever is necessary to conduct him safely in the new and untrodden path of his duty.

The Docket Entries, for instance, given as specimens of method in recording the general parts and transactions of a suit—matters in which, more frequently than in any other, magistrates are at fault—though compendious, are sufficiently full; and a reasonable attention to the marginal specimens of taxation, will guard the unwary from those inadvertent charges of fees, which serve too often to put the magistrate in the power of the suitor, and to involve him in a contest about farthings, which may cost him dollars; to say nothing of the loss of character, which, right or wrong, follows an infliction of the penalty annexed to extortion.

These, however, are comparatively trifling instances of the value of the book: as a Manual, it will be more signally useful in furnishing a safe and ready guide in the most complicated forms of proceedings, such as summary convictions, and many others.

The matter is, for the most part, original, and supplies whatever has been omitted in other treatises. It will afford assistance, not only to the judicial magistrate, but to every county and township officer.

"I fully concur in the above. MOLTON C. ROGERS,"
One of the Justices of the Supreme Court of Pennsylvania.

"I have seen a portion of Mr. Binns's proposed publication, relative to Justices of the Peace, and think it will furnish an excellent manual on the subject, more especially to the magistracy. It seems to me to be well adapted to the present wants of the community. THOMAS SERGEANT,"
One of the Justices of the Supreme Court of Pennsylvania.

"PHILADELPHIA, February 4th, 1845.

"DEAR SIR:—I have carefully examined, with much satisfaction, a portion of your 'Magistrate's Daily Companion.' Your arrangement is capital, and you have taken great pains to insure its legal accuracy. It should be in the hands of every magistrate, as well as young lawyer. I wish it general circulation, because I am confident it will be of great utility. You deserve the thanks of the community for this work. I have no doubt it will live when you are dead.

THOMAS BURNSIDE,"
One of the Justices of the Supreme Court of Pennsylvania.

SERGEANT'S MECHANICS' LIEN LAW.

A Treatise on the Lien of Mechanics and Material Men in Pennsylvania, with the Acts of Assembly relating thereto, and various forms of Claims. By HENRY J. SERGEANT, Esq.

From the Hon. John Kennedy, one of the Justices of the Supreme Court of Pennsylvania.

Mr. Sergeant's Treatise on our Lien Laws, securing to Mechanics and Material Men the price of their labours performed and materials furnished in the erection of houses, &c., I have read with attention. The division of the entire subject under its various heads, appears to be quite appropriate, and well adapted to present and bring into view, not only all the questions growing out of those laws which have been moved, discussed and decided at different times, but likewise, as it seems to me, almost every question that can be raised. The publication of it confers a real benefit upon all who wish to avail themselves of the security provided by the Lien Laws therein treated of.

BRIGHTLY ON THE LAW OF COSTS.

A Practical Treatise on the Law of Costs in Pennsylvania, with the Fee Bill and Decisions of the Courts thereon, and a view of the remedies for taking illegal fees. By F. C. BRIGHTLY, Esq., Counsellor at Law. In one octavo volume.

From his Excellency, Francis R. Shunk, late Governor of the State of Pennsylvania.

HARRISBURG, Nov. 13, 1847.

"Brightly on the Law of Costs" is a work of great value to the Profession, and the author has, I think, succeeded in making a very lucid and satisfactory arrangement of

the various divisions of the subject. The whole scope of the work is inestimable, the law of costs and fees is not too well understood by many of the Profession, and for the want of accurate knowledge, impositions are tolerated which press heavily upon the unfortunate. The taking of illegal costs and fees is a great evil which this book is calculated to lessen, and hence its effects will be most meritorious.

From the Philadelphia Ledger.

F. C. Brightly, Esq., a member of the Philadelphia bar, has just published a Treatise on the Law of Costs in Pennsylvania, with the fee bill and the decisions of the Courts thereon, and a view of the remedies for taking illegal fees. This is a work which has long been wanted, and is necessary to every one engaged in the prosecution of actions in a Court of Record. A knowledge of its contents will prevent one of the worst evils connected with suits, the imposition of illegal fees, and if the author succeeds in correcting this great abuse, he will accomplish much good.

From an Eminent Member of the Pittsburgh Bar.

Commencing with the English Statute of Gloucester, by which costs, which formed no feature of the common law (strange as this may seem to modern eyes and ears), were first introduced, he has associated together the English statutes in force here with the Pennsylvania acts of Assembly, and also their judicial construction and interpretation, in historical succession.

The rights of plaintiffs and defendants, suing or sued in their own right, are systematically treated in the two first chapters, followed by a lucid exposition of costs on those who sustain a representative character, and in separate apartments are arranged, with care and completeness, each separate action, and the rules which govern the award of costs for either party. The peculiarity which arises from the unique system of domestic tribunals, called compulsory arbitrations, has the exact niche which its distinctive merits deserves. The themes of Divorce, Elections, Taxes, and all other *costly* articles, even Railroads, are touched upon *en suite*. The costs of criminal proceedings and all the complex questions of practice in conducting actions are well treated, and the "cases" searchingly gathered, and appropriated within the ready reach of the sudden occasion.

It affords pleasure to remark, through the whole book, the absence of that air of pretension and theory, so obtrusive in many (so called) elementary treatises. We seek for the law as it has been decided and enacted, and it is thus to be found here, based upon decisions or legitimate inferences from them, and without any display of wisdom above what is written. It may not sell out of the profession, and justiciary, and their connexions, but within these, and in every office about our Court Houses, it will be an essential guide book. To my own opinion of its decided merit, I can add the approbation of the experienced clerical gentlemen of this county. If I might make a practical suggestion, it would be that a few examples of taxed bills would be useful to more than beginners.

MORRIS ON THE LAW OF REPLEVIN.

A Practical Treatise on the Law of Replevin in the United States; with an Appendix of Forms, and a Digest of Statutes. By P. Pemberton Morris, Esq., of the Philadelphia Bar. In one octavo volume.

This volume embraces a full view of the cases in which the action of Replevin applies, of the Writ, Parties, Pleadings, Trial, Judgment and Execution, both at Common Law and under the Statutes—with an account of the action De Homine Replegiando, and of the proceedings on the Replevin Bond, and on the Claim Property Bond, and against the sheriff for taking insufficient sureties. The work also contains a Review of the English Action, and full references to the Decisions of the several States with an Appendix of Forms of Pleadings; and the English, Pennsylvania, and Massachusetts Statutes, and such portions of the New York Code of Procedure as apply to the Action of Replevin.

From the New York Daily Tribune.

We are glad to see a work on this difficult but useful branch of law learning. It was greatly needed. The American Bar has heretofore been without any native Treatise,

and we have heard professional men complain much of the difficulties which beset them in their practice where the recondite Replevin Law was involved. Hereafter there will be no reason to complain. This is a plain, practical, common-sense treatise; just such as was wanted; it is well done; the cases are carefully cited and commented on; the legal propositions are accurately and neatly stated; the reasonings of the Courts thoroughly considered and set forth; the subject-matter adequately treated with great abundance of both ancient and modern learning and much discrimination, equally creditable to the author's diligence and sound judgment. Not the least valuable part of the book is the Appendix, where Forms are collected which cannot fail to save labour and to be of great service to the profession. There is also a good Index and Table of Cases, both indispensable in all practical law books.

From the Boston Law Reporter.

Mr. Morris seems to have satisfactorily performed his difficult task. The law seems to be fully and fairly set forth; and, what is always desirable, very compactly stated. Cases are not crowded in with a morbid affectation of extreme learning, but although his citations are from the Reports and statute books of every State in the Union, as well as of England, he has confined himself to such as relate to, and not merely resemble the questions under discussion. A slight notice is due to the publishers of this work for the elegant form in which they have given it to the public. We have rarely seen a handsomer law book.

From Professor Greenleaf, Author of "Greenleaf on Evidence."

Messrs KAY & BROTHER: ANDOVER, May 4, 1849.

DEAR SIRS:—I beg you to accept my sincere thanks for the copy of "Morris on Replevin," which you had the kindness to send me. I have looked through it with much interest and pleasure. It is a luminous and well-digested treatise, and cannot fail to be highly acceptable to the profession, as well as creditable to the learned author.

Very respectfully, your much obliged servant, S. GREENLEAF.

From the National Intelligencer.

MORRIS ON REPLEVIN.—The now frequent use of the writ *de homine replegiando* as the remedy by statute in some of the States for the illegal detention of slaves, and its probably general adoption on all questions of slavery, is especially treated of, and traced from its common-law origin to its now extended application in cases of fugitives from justice; in which view this learned treatise will doubtless be interesting, and perhaps important, to the legal profession in the Southern States.

From the American Law Journal.

The Law of Replevin has been so greatly improved in the United States, and rests so extensively upon usage and decisions, scattered through the Reports, that this Treatise will, without doubt, be well received. It places within reach of the student and the practitioner information which cannot elsewhere be obtained, but at the expense of much time and labour.

From the Philadelphia Legal Intelligencer.

The wide field which the action of Replevin now embraces, the nicety and care required in the conduct of the proceedings, the different relations of the parties to the suit, and the frequently complicated character of the pleadings, give to it an importance which it otherwise would not possess. The subject has received a careful examination at the hands of Mr. Morris, and we do not hesitate to say that his book will be found a practically useful one, not only to the Pennsylvania lawyer, but to the profession throughout the country. We have no doubt that the work will find a ready and extensive sale.

From Hunt's Merchants' Magazine.

This contribution to the law learning of our country will be found valuable in most of the States, and will prove an important addition to the library of the American lawyer.

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